SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 19[illegible]

No. [illegible] 83

UNITED STATES, APPELLANT

vs.

EUGENE FRANK BOBEL

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

FILED MARCH 16, 1983
PROBABLE JURISDICTION NOTED MAY 16, 1983

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1107

UNITED STATES, APPELLANT

vs.

EUGENE FRANK ROBEL

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

No. 50676

UNITED STATES OF AMERICA, PLAINTIFF

v.

EUGENE FRANK ROBEL, DEFENDANT

INDICTMENT—Filed May 21, 1963

The Grand Jury Charges:

COUNT I

1. That there is and has been in effect since October 20, 1961 a final order of the Subversive Activities Control Board requiring the Communist Party of the United States of America to register with the Attorney General of the United States as a "Communist-action organization," as defined in Title 50, United States Code, Section 782.

2. That on or about August 20, 1962, the Secretary of Defense, pursuant to the provisions of Title 50, United States Code, Section 784(b), designated the Todd Shipyards Corporation, Seattle Division, Seattle, Washington, as a defense facility, and thereafter notices of such designation were posted and continue to be so posted, by the corporation in conspicuous places about the plant.

3. That from on or about November 19, 1962 and continuously up to and including the date of this indictment, in the Northern Division of the Western District of Washington and within the jurisdiction of the Court, Eugene Frank Robel did unlawfully and willfully engage in employment in a defense facility, to wit, Todd

Shipyards Corporation, Seattle Division, while at the same time being a member of the Communist Party of the United States of America with knowledge and notice of the said final order requiring the Communist Party to register with the Attorney General as a Communist-[fol. 2] action organization and with knowledge and notice that the said Todd Shipyards Corporation, Seattle Division had been and continues to be designated a defense factility by the Secretary of Defense, in violation of Title 50, United States Code, Section 784(a)(1)(D).

A TRUE BILL.

DANIEL M. NARODICK
Foreman

BROCKMAN ADAMS
United States Attorney

BRANDON ALVEY
Special Attorney, Department of Justice

JAMES P. MORRIS
Special Attorney, Department of Justice

[fol. 3]

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

[File Endorsement Omitted]

[Title Omitted]

MOTION TO DISMISS THE INDICTMENT—Filed June 6, 1963

Defendant above named hereby moves the court for an order dismissing the indictment in the above entitled case on the ground that it fails to charge an offense for the following reasons:

1. That the statute upon which said indictment is based, that is, Section 5(a)(1)(D) of the Internal Security Act of 1950, (50 U.S.C. Sec. 784(a)(1)(D)) is void on its face as a direct abridgment of the freedoms protected from Congressional interference by the First Amendment to the Constitution of the United States;

2. That the section is void on its face as a statute which without due process of law takes away, or purports to take away, property, particularly the property right of a person to enter into a contract for gainful employment, contrary to the provisions of the Fifth Amendment;

3. That the section is void on its face in that it is impossible to ascertain from the statute what conduct, if any, could, would, or does constitute a criminal act under it, and by reason of this vagueness as to what constitute the elements of the conduct purportedly prohibited by it, the statute deprives a person charged under it of due process of law contrary to the Fifth Amendment;

4. That the section on its face, and as applied in this [fol. 4] indictment, is void in that the alleged designation of the Communist Party of the United States of America as a "communist action organization"

(a) fails by so designating the Communist Party in administrative proceedings conducted without any notice

of any kind to the defendant to afford defendant notice, hearing or opportunity to be heard, and of the right of confrontation of witnesses, and cross examination with respect to an essential element of this indictment, thus depriving defendant of due process of law in violation of the Fifth Amendment; and

(b) fails to set forth or charge facts to be considered by the jury as to the nature of the Communist Party, and particularly as to whether the Communist Party is, in fact, a "communist action organization" as defined by the statute, thus depriving him of a jury trial on an essential element of the charge, in violation of the Sixth Amendment; and

(c) fails to allege or show that any reasonable relationship exists between a public or national interest which can be constitutionally protected and the means sought to be applied by this statute to protect such interest: that is, the administrative proscription of the Communist Party and the consequential proscription of defendant's freedom to contract for gainful employment as an alleged member of such political party.

5. The section on its face, and as construed and applied in this indictment, is void in that in designating Todds Shipyards Corporation, Seattle Division, Seattle, Washington, as a defense facility

(a) the secretary of Defense acted without any notice to defendant and thus has deprived him of due process of law contrary to the Fifth amendment; and

(b) the Secretary of Defense has designated all em- [fol. 5] ployment within Todds Shipyards Corporation, Seattle Division, as prohibited to members of the Communist Party and thus has unreasonably and arbitrarily excluded, or attempted to exclude, persons from employment, without any relationship being shown, alleged, or existing between any lawful and constitutional objective and the means sought to achieve such objective, thus depriving defendant of due process of law in violation of the Fifth Amendment; and

(c) fails to provide for a jury determination of whether the employment of defendant involves any question of the security of a national defense establishment, thus de-

priving him of a jury trial on an essential element of the indictment, contrary to the provisions of the Sixth Amendment.

Dated this 5th day of June, 1963.

JOHN CAUGHLAN
Attorney for Plaintiff

[fol. 6]

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

No. 50676

[File Endorsement Omitted]

UNITED STATES OF AMERICA, PLAINTIFF

v.

EUGENE FRANK ROBEL, DEFENDANT

MEMORANDUM OPINION AND ORDER—October 4, 1965

The United States procured the indictment of Eugene Frank Robel in May, 1963 for an alleged violation of Section 5(a)(1)(D) of the Subersive Activities Control Act, 50 U.S.C. § 784(a)(1)(D). The indictment contains but one count which charges:

"COUNT I

"1. That there is and has been in effect since October 20, 1961 a final order of the Subversive Activities Control Board requiring the Communist Party of the United States of America to register with the Attorney General of the United States as a 'Communist-action organization,' as defined in Title 50, United States Code, Section 782.

"2. That on or about August 20, 1962, the Secretary of Defense, pursuant to the provisions of Title 50, United States Code, Section 784b), designated the Todd Shipyards Corporation, Seattle Division, Seattle, Washington, as a defense facility, and thereafter notices of such designation were posted, and continue to be so posted, by the corporation in conspicuous places about the plant.

"3. That from on or about November 19, 1962 and continuously up to and including the date of this indictment, in the Northern Division of the Western District of Washington and within the jurisdiction of the Court, Eugene Frank Robel did unlawfully and willfully engage in employment in a defense facility, to wit, Todd Shipyards Corporation, Seattle Division, while at the same time being a member of the Communist Party of the United States of America with knowledge and notice of the said final order requiring the Communist Party to register with the Attorney General as a Communist-action organization and with knowledge and notice that the said Todd Shipyards Corporation, Seattle Division had been and continues to be designated a defense facility [fol. 7] by the Secretary of Defense, in violation of Title 50, United States Code, Section 784(a)(1)(D)."

The subsection of the statute reads as follows:

"When a Communist organization, as defined in paragraph (5) of section 782 of this title, is registered or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful—

"(1) For any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

* * * *

"(D) if such organization is a Communist-action organization, to engage in any employment in any defense facility."

Defendant promptly moved to dismiss the indictment on the ground that it fails to charge an offense for the reason that the statute upon which it is based is violative of Article I, Section 9, and of the First, Fifth and Sixth Amendments to the Constitution of the United States, and for the additional reason that the indictment fails to set forth and state certain essential elements of the offense charged.

Briefs supporting and opposing the motion were filed and oral argument had. Decision on the motion has been delayed, awaiting final decision in the cases of *Aptheker* v. *Secretary of State* (1964) 378 U.S. 500, and *United States* v. *Brown* (1965) 381 U.S. 437, involving similar issues.

Supplemental argument in letter form was submitted following the decision in said cases.

For the purpose of this motion certain pertinent facts alleged in the proceedings may be assumed as true. They are that Robel, a native-born citizen of the United States, approximately fifty-four years of age, has been employed as a shipyard worker at the Todd Shipyards for a period in excess of ten years. During that time he has been, [fol. 8] and still is a member of the Communist Party. On August 20, 1962, the Secretary of Defense designated Todd Shipyards as a "defense facility," within the meaning of the Act. Notices to that effect were posted conspicuously in the plant area. Ninety days later, on November 19, 1962, Robel's continued acts of employment, which remained unchanged and which apparently had been lawful up until this time, then became criminal. As can be seen from the indictment, no charge is made against Robel that he is an active member of the Party, or that he is acting or has acted or intends to act to further the unlawful purposes of the Party. No charge is made that he intends to promote strikes or engage in activities inimical to the security of the United States. The government argues that it does not have to prove these elements. All it has to prove, under the statute, are the following four facts:

(1) An order of the Attorney General requiring the Communist Party of America to register as a Communist-Action group;

(2) Designation of Todd Shipyards as a defense facility by the Secretary of Defense;
(3) Knowledge on the part of Robel that the shipyard had been designated as a defense facility and knowledge that the Attorney General had ordered the Party to register; and
(4) Membership of Robel in the Communist Party.

For the confluence of these four factors alone criminal guilt (supposedly) flows. In other words, it is argued that the defendant is criminally liable regardless of whether he is an active or passive member of the Party, regardless of whether he believes and subscribes to a [fol. 9] few, most, or all of the Party's aims, and regardless of whether he personally has any intent to act adversely to the government's interests.

Throughout its brief the government contends that membership in the Communist Party is not, without more, a crime. Nevertheless, the defendant here subjects himself to the full penalties of the statute unless he either relinquishes his employment with the shipyard or resigns from the Party. Giving up his employment, we may assume, would mean a severe hardship, possibly involving the loss of valuable seniority rights. Thus, the only financially acceptable choice is resignation from the Party, although he has the lawful right to be a member. But the government contends he does not have a right to continue working at the shipyard *and* remain a member of the Communist Party—this is a crime. It is a crime not because of anything Robel has done but because the large group of which he is a member has been administratively adjudicated to have certain unlawful purposes. If all of Robel's activities remain unchanged—except that he gives up his Party membership—then there is no guilt; no crime is committed. Still, the government contends that being a Communist is not criminal. Whatever the precise element that Party membership contributes to criminality it is undeniably the central fact upon which guilt will depend in this case. And when criminal guilt is dependent upon a person's association with a large class of people, questions of First Amendment freedoms and due process under the Fifth Amendment hover in the background, and the indictment must be strictly construed.

An examination of *Scales* v. *United States* (1961) 367 U.S. 203 and *Noto* v. *United States* (1961) 367 U.S. 290 in connection with the recent cases of *Aptheker* v. *Secretary of State* (1964) 378 U.S. 500 and *Brown* v. *United* [fol. 10] *States* (1965) 381 U.S. 437 convinces me that the indictment does not charge an offense against the United States.

The government contends without reservation that the indictment need not allege nor prove the defendant was an active or participating member of the Communist Party with knowledge of its unlawful purposes and a specific intent to advance such purposes. It is true that the statute does not explicitly so provide or require. This omission may ultimately serve to render subsection 5 of the Act here under consideration (50 U.S.C. § 784(a)) unconstitutional as it did with respect to section 6 of the Act (50 U.S.C. § 785). *Aptheker* v. *Secretary of State*, supra, at page 511, footnote 9. Certainly if this likely constitutional infirmity is to be overcome the requirements of active membership and specific intent must be deemed implicitly in the statute. *Scales* v. *United States*, 367 U.S. 203, page 220 and footnote 11, page 221.

The indictment does not charge specifically or by inference either of the essential elements of active and knowing membership nor specific intent and the government does not so contend.

The nexus of guilt between a group and one of its members must depend on links more numerous and more substantial than those charged by the government.

It is therefore ORDERED that the indictment be and is hereby DISMISSED.

DATED October 4, 1965.

WILLIAM J. LINDBERG
United States District Judge

[fol. 11]

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

[Title Omitted]

NOTICE OF APPEAL—Filed November 2, 1965

TO: JOHN CAUGHLAN
Attorney for Defendant
220 Second and Cherry Building
Seattle, Washington

COMES NOW United States of America, plaintiff herein, by and through its attorneys William N. Goodwin, United States Attorney for the Western District of Washington, and Gerald W. Hess, Assistant United States Attorney for said District and appeals from the Order of Dismissal entered in the above-entitled cause on October 4, 1965 by the Honorable William J. Lindberg, District Judge; which Order dismissed an Indictment in one count charging the defendant Eugene Frank Robel with violation of Title 50 U.S.C., Section 784(a)(1)(D), in that from on or about November 19, 1962, until the date of the Indictment, said defendant did unlawfully engage in employment in a defense facility while being a member of the Communist Party of the United States of America with knowledge and notice of a final order of the Subversive Activities Control Board requiring the Communist Party of the United States to register with the Attorney General of the United States as a Communist-action organization.

DATED this 2 day of November, 1965.

WILLIAM N. GOODWIN
United States Attorney

GERALD W. HESS
Assistant United States Attorney

Office address:

1012 U.S. Courthouse
Seattle, Washington
98104

[fol. 12]

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

No. 50676

[Title Omitted]

ORDER GRANTING EXTENSION OF TIME FOR FILING THE RECORD ON APPEAL AND DOCKETING THE APPEAL—Filed December 14, 1965

IT APPEARING that good cause exists to continue the time for filing the record on appeal and docketing the said appeal in the above-entitled cause, and the parties through their respective counsel having orally agreed that an order extending the time for filing the record on appeal and docketing the appeal may be entered extending said time until January 31, 1966, it is hereby,

ORDERED that the time for filing the record on appeal and docketing the appeal in the above-entitled cause be extending to January 31, 1966.

DATED this 13th day of December, 1965.

WILLIAM J. LINDBERG
United States District Judge

Presented and Approved by:

GERALD W. HESS
Assistant United States Attorney

[fol. 14]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO RECORD ON APPEAL
(Omitted in Printing)

[fol. 17]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20705

UNITED STATES OF AMERICA, APPELLANT

v.

EUGENE FRANK ROBEL, APPELLEE

MOTION TO CERTIFY THE CAUSE TO THE SUPREME COURT OF THE UNITED STATES—filed February 9, 1966

The United States moves this Court to certify the above-entitled case to the Supreme Court of the United States pursuant to the Criminal Appeals Act, as amended (18 U.S.C. 3731) on the ground that the appeal herein from a Judgment dismissing an Indictment on the ground of the invalidity or construction of the statute, Section 5(a)(1)(D) of the Subversive Activities Control Act, 50 U.S.C. 784(a)(1)(D), should have been taken directly to the Supreme Court.

Respectfully submitted,

/s/ William N. Goodwin
United States Attorney

/s/ Gerald W. Hess
Assistant United States Attorney

[fol. 18] Points and Authorities

This is an appeal from the dismissal of a one-count Indictment which charges that the defendant Eugene Frank Robel unlawfully and wilfully violated Section 5(a)(1)(D) of the Subversive Activities Control Act of 1950, 50 U.S.C. 784(a)(1)(D), by engaging in employment from on or about November 19, 1962, up to and including the date of the Indictment in a defense facility, to wit, Todd Shipyards Corporation, Seattle, Division, while at the same time being a member of the Communist Party of the United States of America with knowledge and notice that the Subversive Activities Control Board had issued an order requiring said Communist Party to register with the Attorney General as a "Communist-action organization" as defined in Title 50, United States Code, Section 782, and with knowledge and notice that the Secretary of Defense had designated said Todd Shipyards Corporation, Seattle Division, as a defense facility pursuant to the provisions of 50 United States Code, Section 784(b) and that said Todd Shipyards Corporation, Seattle Division, was still so designated. The Indictment also alleged that the final order requiring said Party to register as aforesaid had been in effect since October 20, 1961, and that the Secretary of Defense had designated, pursuant to the provisions of 50 United States Code, Sec-
[fol. 19] tion 784(b), on or about August 20, 1962, as a defense facility the said Todd Shipyards Corporation, Seattle Division, and that the corporation had thereafter posted in conspicuous places about the plant notices of such designation and that such notices continued to be so posted.

The defendant moved to dismiss the Indictment on the ground that it failed to charge an offense for the reason that the statute on which it was based violated Article I, Section 9, and the First, Fifth, and Sixth Amendments to the Constitution of the United States, and for the additional reason that the Indictment failed to state essential elements of the offense charged.

The District Court constructed Section 784(a)(1)(D) of Title 50 to require as essential elements of the offense that the defendant have active and knowing membership

in the Communist Party and that he also have specific intent to further the unlawful purposes of the Party; if not construed to make such activity and intent elements of the offense, the Court said that 50 U.S.C. 784(a) might be unconstitutional citing *Aptheker* v. *Secretary of State*, 378 U.S. 500, 511, and *Scales* v. *United States*, 367 U.S. 203, 220-221. The relevant parts of the memorandum opinion read:

> The government contends without reservation that the Indictment need not allege nor prove the defendant was an active or participating member of the [fol. 20] Communist Party with knowledge of its unlawful purposes and a specific intent to advance such purposes. It is true that the statute does not explicitly so provide or require. This omission may ultimately serve to render subsection 5 of the Act here under consideration (50 U.S.C. § 784(a)) unconstitutional as it did with respect to section 6 of the Act (50 U.S.C. § 785). *Aptheker* v. *Secretary of State, supra*, at page 511, footnote 9. Certainly if this likely constitutional infirmity is to be overcome the requirements of active membership and specific intent must be deemed implicity [sic] in the statute. *Scales* v. *United States*, 367 U.S. 203, page 220 and footnote 11, page 221.
>
> The indictment does not charge specifically or by inference either of the essential elements of active and knowing membership nor specific intent and the government does not so contend.

The judgment of the District Court dismissing the Indictment necessarily depended upon the Court's construction of Section 784(a)(1)(D) of the statute as making essential elements of the offense the active or knowing membership of the defendant in the Communist Party and his specific intent to advance the unlawful purposes of the Party. It was equivalent to the sustaining of a plea in bar when the defendant has not been put in jeopardy, and the United States was entitled to appeal, and should have appealed, directly to the Supreme Court. *United States* v. *Sampson*, 371 U.S. 75; *United States* v.

Braverman, 373 U.S. 405; *United States* v. *Mersky*, 361 U.S. 431.

[fol. 21] For the foregoing reasons, this Court should certify the case to the Supreme Court of the United States. 18 U.S.C., 3731; *United States* v. *Blue*, 350 F(2d) 267. (C.A. 9).

[fol. 22]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20705

[Title Omitted]

ORDER GRANTING MOTION TO CERTIFY A DIRECT APPEAL TO THE SUPREME COURT OF THE UNITED STATES—
filed March 1, 1966

The motion of the United States to certify this cause to the Supreme Court of the United States, pursuant to the provisions of Title 18 U.S.C., Section 3731, having been submitted to the Court on February 21, 1966, and it appearing that the appeal taken herein to this Court on November 2, 1965 should properly have been taken directly to the Supreme Court of the United States for the reason that the Judgment of the District Court for the Western District of Washington, dated October 4, 1965, dismissing the Indictment, was based on the invalidity and construction of the statute upon which the Indictment was formed, that is, Section 5(a)(1)(D) of the Subversive Activities Control Act, Title 50 U.S.C., Section 784(a)(1)(D), it is therefore now

ORDERED that the motion of the United States is hereby granted and it is further ordered that the Clerk

[fol. 23] of this Court certify this case to the Supreme Court of the United States.

DATED this 28th day of February, 1966.

(Illegible)
Judges of the United States Court
of Appeals for the Ninth Circuit

Presented by:

/s/ Gerald W. Hess
GERALD W. HESS
Assistant United States Attorney

[fol. 25] [Clerk's Certificate to foregoing transcript omitted in printing]

[fol. 26]

SUPREME COURT OF THE UNITED STATES

No. 1107, October Term, 1965

UNITED STATES, APPELLANT

v.

EUGENE FRANK ROBEL

Appeal from the United States District Court
for the Western District of Washington

ORDER NOTING PROBABLE JURISDICTION—May 16, 1966

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1966 219907 864

FILED
MAR 2 1 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

7

No. ~~1107~~ 8

UNITED STATES OF AMERICA,

Appellant,

v.

EUGENE FRANK ROBEL

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

MOTION TO AFFIRM

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Supreme Court of the United States

OCTOBER TERM, 1965

No. 1107

UNITED STATES OF AMERICA,

Appellant,

v.

EUGENE FRANK ROBEL

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

MOTION TO AFFIRM

Eugene Frank Robel, appellee, moves to affirm the judgment of the United States District Court for the Western District of Washington, Northern Division, dismissing the indictment herein. The ground for this motion is that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

OPINION BELOW

The opinion below (Appendix A, *infra*) has not yet been officially reported.

JURISDICTION

The indictment charges appellee with violating section 5(a)(1)(D) of the Subversive Activities Control Act (herein called the Act), 50 U.S.C. 784(a)(1)(D). The District Court dismissed the indictment on October 4, 1965, on the ground that it does not charge a violation of section 5 of the Act, as interpreted by the court, or alternatively that section 5 is unconstitutional.

On November 2, 1965, the government filed a notice of appeal to the Court of Appeals for the Ninth Circuit. On February 28, 1966, the Court of Appeals granted the government's unopposed motion to certify the case to this Court pursuant to 18 U.S.C. 3731. The case was docketed in this Court on March 10, 1966.

Jurisdiction of the appeal is conferred on the Court by 18 U.S.C. 3731. The following cases sustain the Court's jurisdiction. *United States v. Wiesenfeld Warehouse Co.*, 376 U.S. 86; *United States v. Sampson*, 371 U.S. 75; *United States v. Braverman*, 373 U.S. 405; *United States v. Mersky*, 361 U.S. 431.

STATUTES INVOLVED

The pertinent provisions of the Subversive Activities Control Act are set forth in Appendix B.

QUESTIONS PRESENTED

1. Whether the indictment charges a violation of section 5(a)(1)(D) of the Act as properly interpreted.

2. If question 1 is answered in the affirmative, whether section 5(a)(1)(D) is constitutional.

STATEMENT

The one-count indictment[1] charges appellee with the offense of engaging in employment in a "defense facility" in violation of section 5(a)(1)(D) of the Act.

Section 5 of the Act provides that when a Communist-action or Communist-front organization[2] registers or is required by a final order of the Subversive Activities Control Board (herein called the Board) to register under the Act, the members of the organization become subject to various prohibitions with respect to employment in the federal government, labor unions and "defense facilities." Section 5(a)(1)(D) provides that if the organization in question is a Communist-action organization, its members may not engage in any employment in a "defense facility." Violations of section 5 are punishable by imprisonment for five years and fine of $10,000. Sec. 15(b).

A Communist-action organization is defined by section 3(3) of the Act as an organization which is controlled by the unnamed foreign government controlling the world Communist movement and which operates primarily to advance the objectives ascribed to this movement by section 2. A defense facility is defined as any establishment or enterprise which the Secretary of Defense designates as a defense facility for the purposes of the Act and which posts notices of the designation. Secs. 5(b) and 3(7).

The indictment alleges that:

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[1] The indictment is set forth verbatim in the opinion below, Appendix A, *infra*.

[2] The section uses the term "Communist organization," defined in section 3(5) to include Communist-action, Communist-front and Communist-infiltrated organizations. Since the last are not required to register under the Act, section 5 is inapplicable to their members.

1. A final order of the Subversive Activities Control Board requiring the Communist Party to register as a Communist-action organization has been in effect since October 21, 1961.[3]

2. On August 20, 1962, the Secretary of Defense designated the Todd Shipyards Corporation, Seattle Division, as a defense facility, and notices of the designation have been posted about the plant.

3. Since November 19, 1962, the appellee has unlawfully and wilfully engaged in employment in the plant while a member of the Communist Party with knowledge and notice both of the final registration order and of the designation of the plant as a defense facility.

The District Court withheld decision on appellee's motion to dismiss the indictment pending this Court's disposition of *Aptheker v. Secretary of State*, 378 U.S. 500 and *United States v. Brown*, 381 U.S. 437. Thereafter, the motion was granted.

The opinion accompanying the court's order ruled that the indictment fails to charge an offense against the United States because it does not allege that appellee "was an active or participating member of the Communist Party with knowledge of its unlawful purposes and a specific intent to advance such purposes." The conclusion that the absence of these allegations is fatal to the indictment is compelled, the court held, by the decisions in *Aptheker*, *Brown*, *Scales v. United States*, 367 U.S. 203, and *Noto v. United States*, 367 U.S. 290. The court recognized that section 5(a)(1)(D) does not in terms make active and knowing membership or specific intent an element of the offense. It ob-

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[3] The Board's order became final under section 14(b) of the Act ten days after the issuance of the mandate of the Court following affirmance of the order in *Communist Party v. S.A.C.B.*, 367 U.S. 1, rehrg. den., 368 U.S. 871.

served that, "This omission may ultimately serve to render [the section] unconstitutional as it did with respect to section 6 of the Act (50 U.S.C. § 785). *Aptheker v. Secretary of State, supra,* at page 511, footnote 9."

ARGUMENT

I.

Aptheker v. United States Establishes That the Provision of the Act Under Which the Indictment Is Laid Violates Substantive Due Process and Cannot Be Saved by Interpretation.

Legislation disqualifying defined classes of individuals from particular types of employment is subject to due process limitations. "[T]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment." *Greene v. McElroy,* 360 U.S. 474, 492, and cases there cited.

Aptheker v. United States, supra, invalidated section 6 of the Act, forbidding members of Communist-action organizations to apply for or use passports, as a denial of due process because it placed over-broad and hence unreasonable restrictions on the right to travel abroad. The rationale of *Aptheker* establishes that section 5, which makes it a crime for members of Communist-action organizations to hold employment in defense facilities, is a similar denial of due process.

Aptheker held that section 6 was condemned by the following considerations:

1. The section applies to all members having knowledge or notice of the issuance of a final registration order against the organization. It thus applies to members who do not know or believe that, in fact, the organization is a Communist-action organization or operates to fur-

ther the aims of the world Communist movement (pp. 509-10). "The provision therefore sweeps within its prohibition both knowing and unknowing members" (p. 510).

2. "Section 6 also renders irrelevant the member's degree of activity in the organization and his commitment to its purpose" (p. 510).

3. "The prohibition of § 6 applies regardless of the purposes for which an individual wishes to travel" and "regardless of the security-sensitivity of the areas in which he wishes to travel" (pp. 511, 512).

4. "Congress has within its power 'less drastic' means of achieving the Congressional objective of safeguarding our national security" (pp. 512-13).

Each of these considerations applies with equal force to section 5(a)(1)(D). It requires no scienter except knowledge or notice of the issuance of a final registration order and the designation of the defense facility. It thus forbids employment to members who have no knowledge of the alleged nature or purpose of the organization, are not active in its affairs, do not share its supposed seditious purposes, and are themselves innocent of wrongdoing. Accordingly, to paraphrase *Aptheker* (at 511), the section "establishes an irrebutable presumption that individuals who are members of the specified organizations will," if employed in a defense facility, "engage in activities inimical to the security of the United States."

Again, section 5 is analogous to section 6 in that it applies without regard to the security-sensitivity of the member's job. The indictment does not allege the nature of appellee's employment in the Todd Shipyard, and this is irrelevant under section 5. Once a plant is designated as a defense facility under sections 3(7) and 5(b), it becomes unlawful under section 5(a)(1)(D) for a member of a proscribed organization to hold *any* job therein, including one which is plainly nonsensitive. Moreover, section 5(b) gives the Secretary of Defense absolute authority to

designate "defense facilities," and thereby drastically to curtail the employment opportunities of members of proscribed organizations. And this unreviewable authority is given notwithstanding that the statutory standard — what "the security of the United States requires" — is so vague and subjective as to invite abuse.

Finally, as even the much-criticized Federal Employee Loyalty Program demonstrates, means less drastic than section 5 were available to safeguard security-sensitive employment. See *Aptheker*, at 513.

Accordingly, section 5, like section 6, "judged by its plain import and by the substantive evil which Congress sought to control sweeps too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment." *Aptheker*, at 514.[4] Indeed, *Aptheker* plainly indicated that section 5 is unconstitutional on this ground. For in distinguishing section 6 of the Act from section 9 (h) of the Taft-Hartley Act, the Court stated (at 513, n. 11): "Although the requirement [of sec. 9(h)] undoubtedly discouraged unions from choosing officers with Communist affiliations, it did not . . . affect basic individual rights to work."

Aptheker establishes that section 5 is not only unconstitutional as written but that it cannot be saved by interpretation. The Court there refused (at 511, n. 9 and 515-17) to read the elements of knowledge, intent and active membership into section 6 or to limit its application to Communist Party leaders. The reasons for its refusal are dispositive of the question with respect to section 5.

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[4] *Aptheker* answers the argument that a member of the Communist Party may free himself from the sanctions of section 5 by abandoning his membership. It states (at 507, fn. omitted): "Since freedom of association is itself guaranteed by the First Amendment, restrictions imposed upon the right to travel cannot be dismissed by asserting that the right to travel could be fully exercised if the individual would first yield up his membership in the given association."

Moreover, even if it were possible to save section 5 in this manner, dismissal of the indictment would still be required for its failure to allege all elements of the offense charged. *United States v. Carll*, 105 U.S. 611; *Morrissette v. United States*, 342 U.S. 246, 270, n.11.

II.

The Indictment Fails To Charge a Violation of Section 5(a)(1)(D) Because It Is Based on the Government's Erroneous Interpretation of the Section as Not Making It an Element of the Offense That the Communist Party Is in Fact a Communist-action Organization.

The indictment alleges that a final order is in effect requiring the Communist Party to register as a Communist-action organization. It does not, however, allege that the Communist Party is in fact a Communist-action organization. Yet, as we show below, section 5(a)(1)(D) of the Act makes the existence of the latter fact an element of the offense, and the government's contrary interpretation of the section is plainly erroneous. Accordingly, the failure to allege that the Communist Party *is* a Communist-action organization is fatal to the indictment. Rule 7(c), Federal Rules of Criminal Procedure; *Hagner v. United States*, 285 U.S. 427, 433.

The court below did not rely on this ground for dismissing the indictment. Since, however, the issue turns on an interpretation of the statute on which the indictment was founded, it is open for consideration on this appeal. *United States v. Wiesenfeld Warehouse Co.*, *supra*, at 92.

A. The Government's Interpretation of Section 5(a)(1)(D) Is Contrary to Its Text.

Section 5 provides that "[w]hen *a Communist organization*, as defined in paragraph (5) of section 3 of this title, is registered or there is in effect a final order of the

Board requiring *such* organization to register," it becomes unlawful for the members of the organization to engage in specified conduct. It is apparent from the quoted text that a person can be guilty of violating section 5 only if two conditions are satisfied with respect to the organization of which he is a member. The organization (1) must be a Communist organization as defined in section 3(5),[5] and (2) must have registered or have been ordered to register.

The conclusion that neither the registration of an organization nor a final order that it register dispenses with the necessity of proving its character in prosecutions of members of the organization under section 5(a)(1)(D) is confirmed by the text of that sub-section. It provides that "if such organization[6] *is* a Communist-action organization," it shall be unlawful for the members to hold jobs in defense facilities. Had Congress intended to make a final order requiring an organization to register as a Communist-action organization conclusive of its character for the purposes of section 5(a)(1)(D), it could easily have said so. Instead, Congress predicated criminal liability of a member, not only on what the organization is found by the Board to be, but on what it "is," and thereby made the existence of the fact as well as of the finding an element of the offense.

An examination of other criminal provisions of the Act shows that Congress deliberately worded section 5 so as to make the fact that the organization "is" a Communist-action organization an element of the offenses. For an additional provision is similarly worded while the others

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[5] Section 3(5) defines Communist organizations as including Communist-action and Communist-front organizations and thus incorporates by reference the section 3(3) and 3(4) definitions of these organizations.

[6] I.e., a Communist organization which has registered or is required by a final order to register.

predicate criminal liability solely upon the fact that the organization has registered or has been finally ordered to do so.

Thus, section 6(a) provides that, "[w]hen *a Communist organization* as defined in paragraph (5) of section 3 of this title is registered, or there is in effect a final order of the Board requiring *such* organization to register;" it shall be unlawful for members of the organization to apply for or use passports. The quoted words are identical with the introductory words of section 5 and, like the latter, make proof that the organization is in fact a Communist organization prerequisite to the conviction of a member.

Section 6(b), however, is worded differently. It provides that "[w]hen *an organization* is registered, or there is in effect a final order of the Board requiring *an organization* to register, as a Communist-action organization," it shall be unlawful for a federal employee to issue a passport to a person whom he knows or believes to be a member. Thus, section 6(b), unlike 6(a) and 5(a)(1)(D), dispenses with proof of the actual character of the organization, and makes proof of the fact of its registration or the issuance of a final registration order sufficient. This is likewise the case with section 10 which punishes violation of the labelling requirements of the Act.[7] Again, section 15(a), punishing the failure to register in obedience to a registration order, does not require proof of the character of the organization but only that it has been ordered to register.

It is apparent from the comparative wording of section 5(a), 5(a)(1)(D) and 6(a), on the one hand, and sections 6 (b), 10 and 15(a), on the other, that Congress was aware of the difference between requiring proof of the fact that an organization is of a specified character and proof of

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[7] The civil sanctions of section 11 (denial of tax deductions and exemptions) are similarly worded.

the fact that it has been found by an administrative agency to be of such character. Whatever its reasons may have been, Congress made the existence of both facts elements of the offense under section 5(a)(1)(D).[8] This conclusion, which follows from the wording of the section, is compelled by the principle that criminal statutes are to be strictly construed. Cf. *Yates v. United States*, 354 U.S. 298, 310-11.

B. The Government's Interpretation of Section 5(a)(1)(D) Is Precluded by Constitutional Considerations.

"The principle is old and deeply imbedded in our jurisprudence that this Court will construe a statute in a manner that requires decision of serious constitutional questions only if the statutory language leaves no reasonable alternative . . . Judicial abstention is especially wholesome where we are considering a penal statute. Our policy in constitutional cases is reinforced by the long tradition and sound reasons which admonish against enlargement of criminal statutes by interpretation." *United States v. Five Gambling Devices*, 346 U.S. 441, 448-49. Accordingly, the Court has not infrequently strained the words of a statute in order to avoid a serious constitutional doubt. *United States v. Rumely*, 345 U.S. 41, 47.

Here, as will be shown, the government's interpretation of the statute presents weighty constitutional questions. On the other hand, as we have seen, no straining of the words of the statute is required to avoid these questions.

Procedural due process.

The only possible justification for invoking the sanctions of section 5 against appellee on account of his alleged membership in the Communist Party is that the latter is a Communist-action organization as defined in the Act.

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[8] The legislative history throws no light on Congress' reasons for so doing.

Nevertheless, as the government interprets the section and has drafted the indictment, the character of the Party is not litigable in the criminal proceeding. Instead, appellee is concluded on this issue by the order requiring the Party to register as a Communist-action organization.

Appellee was not a party to the proceeding in which the Communist Party was found to be a Communist-action organization and ordered to register as such.[9] And the Act provides no procedure which would permit appellee to challenge this finding unless he may do so in his prosecution under section 5. Accordingly, if the government's interpretation of section 5 is correct, the Act denies appellee due process by subjecting him to deprivation of his liberty and property without a hearing at which he may contest the factual premise on which the validity of the deprivation depends. *United States v. Carolene Products Co.*, 304 U.S. 144, 152; *Noto v. United States*, 367 U.S. 290, 299; *Renaud v. Abbott*, 116 U.S. 277, 288. Cf. *Kirby v. United States*, 174 U.S. 47.

The due process defect inherent in the government's interpretation of section 5 is aggravated by the fact that the determination of the character of the Communist Party which, as the indictment charges, concludes appellee was made in 1953,[10] ten years before the return of the indictment. To preclude appellee from contesting the continuing validity of this stale determination would violate the due process principle that "the constitutionality of a statute predicated on the existence of a particular state of facts may be challenged by showing to the court that

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[9] In accordance with section 13(a) of the Act, the proceeding was brought against the Communist Party alone. See *Communist Party v. S.A.C.B.*, *supra*.

[10] See *Communist Party v. S.A.C.B.*, *supra*, at 19-20.

those facts have ceased to exist."[11] *United States v. Carolene Products Co., supra,* at 153; *Chastleton Corporation v. Sinclair,* 264 U.S. 543; *Baker v. Carr,* 369 U.S. 186, 214.

The government will doubtless argue that appellee is afforded due process by sections 13(b) and (i) of the Act which permits a *registered* organization to obtain a Board order canceling its registration upon a showing that it is no longer a Communist-action organization. This procedure, even if adequate to protect appellee, is not available. For the Communist Party has not registered, and is still litigating the contentions, held premature in *Communist Party v. S.A.C.B., supra,* that it cannot constitutionally be required to do so. See *Communist Party v. United States,* 331 F.2d 807, cert. den., *377 U.S. 968; Communist Party v. United States,* Nos. 19880 and 19881, C.A.D.C. Obviously, appellee's constitutional rights may not be denied because the Communist Party has elected to assert its own.

Attainder

Section 5 as interpreted by the government, is a bill of attainder. Unlike the statute invalidated in *United States v. Brown,* 381 U.S. 437, section 5 does not identify the Communist Party by name but delegates to the Board the function of identifying the organization which satisfies the Act's definition of a Communist-action organization. But the difference is immaterial if the government's interpretation of section 5 is accepted. For that interpretation precludes appellee from challenging the continuing

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[11] The more so here because, as the Chief Justice observed (at 134 n.11), the Board's determination was itself based on a presumption of continuity which "is certainly dubious" as applied to "stale evidence" of Party activity prior to 1940. And cf. *American Committee for Protection of Foreign Born v. S.A.C.B.,* 380 U.S. 503, and *Veterans of Abraham Lincoln Brigade v. S.A.C.B.,* 380 U.S. 513.

subversion of what we have thought to be one of the most effective constitutional safeguards of all men's freedom."

United States v. England, supra, relied on Justice Jackson's opinion in rejecting the government's contention that the Internal Revenue Code should be construed as making the Commissioner's determination that a taxpayer had received taxable income conclusive of that fact in a prosecution of the taxpayer for failing to report the income. The government's interpretation of section 5 must likewise be rejected since it too would submit the "vital and controversial part" of the charge against appellee — the character of the Communist Party — to conclusive administrative determination.[15]

It will be argued that the government's interpretation of section 5 should prevail because it would be impractical to permit relitigation of the status of the Communist Party in each prosecution under the section. But it is only in "rare and exceptional circumstances" that the literal meaning of a statute will be disregarded, even when it seems to lead to an absurd result. *Crooks v. Harrelson,* 282 U.S. 55, 60. There is nothing absurd about a literal interpretation of section 5. And it is no more impractical to require proof of the character of the Communist

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[15] Justice Jackson's opinion is not contrary to *Yakus v. United States*, 321 U.S. 414, holding that Congress may penalize the violation of administrative rules of general application and provide that the validity of the latter may not be challenged in a prosecution for the violation. The distinction, pointed out by Justice Jackson (at 179), is between rule-making and the power of adjudication. Nor is the opinion contrary to *Cox v. United States*, 332 U.S. 442, holding that the denial of a draft exemption is conclusive in a prosecution for draft evasion. A draft exemption is an exceptional privilege, not constitutionally required in the exercise of the war power, which the government may withhold substantially on its own terms. But where criminal liability may constitutionally be imposed only if certain facts exist, the existence of the requisite facts must be determined in the criminal proceeding, and not administratively.

Party in each prosecution under that section than to require similar proof in each prosecution under the membership clause of the Smith Act. See *Scales v. United States*, 367 U.S. 203 and *Noto v. United States*, 267 U.S. 290. As the latter stated (at 299):

> "The kind of evidence which we found in *Scales* sufficient to support the jury's verdict of present illegal Party advocacy is lacking here in any adequately substantial degree. It need hardly be said that it is upon the particular evidence in a particular record that a particular defendant must be judged, and not upon the evidence in some other record or upon what may be supposed to be the tenets of the Communist Party."

CONCLUSION

The motion to affirm should be granted.

Respectfully submitted,

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APPENDIX A
[Opinion and Judgment Below]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EUGENE FRANK ROBEL,

Defendant.

MEMORANDUM OPINION AND ORDER

The United States procured the indictment of Eugene Frank Robel in May, 1963 for an alleged violation of Section 5(a)(1)(D) of the Subversive Activities Control Act, 50 U.S.C. § 784(a)(1)(D). The indictment contains but one count which charges:

"COUNT I

"1. That there is and has been in effect since October 20, 1961 a final order of the Subversive Activities Control Board requiring the Communist Party of the United States of America to register with the Attorney General of the United States as a 'Communist-action organization,' as defined in Title 50, United States Code, Section 782.

"2. That on or about August 20, 1962, the Secretary of Defense, pursuant to the provisions of Title 50, United States Code, Section 784(b), designated the Todd Shipyards Corporation, Seattle Division, Seattle, Washington, as a defense facility, and thereafter notices of such designation were posted, and continue to be so posted, by the corporation in conspicuous places about the plant.

"3. That from on or about November 19, 1962 and continuously up to and including the date of this indictment, in the Northern Division of the West-

ern District of Washington and within the jurisdiction of the Court, Eugene Frank Robel did unlawfully and willfully engage in employment in a defense facility, to wit, Todd Shipyards Corporation, Seattle Division, while at the same time being a member of the Communist Party of the United States of America with knowledge and notice of the said final order requiring the Communist Party to register with the Attorney General as a Communist-action organization and with knowledge and notice that the said Todd Shipyards Corporation, Seattle Division had been and continues to be designated a defense facility by the Secretary of Defense, in violation of Title 50, United States Code, Section 784(a)(1)(D)."

The subsection of the statute reads as follows:

"When a Communist organization, as defined in paragraph (5) of section 782 of this title, is registered or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful —

"(1) For any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final —

* * *

"(D) if such organization is a Communist-action organization, to engage in any employment in any defense facility."

Defendant promptly moved to dismiss the indictment on the ground that it fails to charge an offense for the reason that the statute upon which it is based is violative of Article I, Section 9, and of the First, Fifth and Sixth Amendments to the Constitution of the United States, and for the additional reason that the indictment fails to set forth and state certain essential elements of the offense charged.

Briefs supporting and opposing the motion were filed and oral argument had. Decision on the motion has been delayed, awaiting final decision in the cases of *Aptheker v. Secretary of State* (1964) 378 U.S. 500, and *United States v. Brown* (1965) 381 U.S. 437, involving similar issues.

Supplemental argument in letter form was submitted following the decision in said cases.

For the purpose of this motion certain pertinent facts alleged in the proceedings may be assumed as true. They are that Robel, a native-born citizen of the United States, approximately fifty-four years of age, has been employed as a shipyard worker at the Todd Shipyards for a period in excess of ten years. During that time he has been and still is a member of the Communist Party. On August 20, 1962, the Secretary of Defense designated Todd Shipyards as a "defense facility," within the meaning of the Act. Notices to that effect were posted conspicuously in the plant area. Ninety days later, on November 19, 1962, Robel's continued acts of employment, which remained unchanged and which apparently had been lawful up until this time, then became criminal.

As can be seen from the indictment, no charge is made against Robel that he is an active member of the Party, or that he is acting or has acted or intends to act to further the unlawful purposes of the Party. No charge is made that he intends to promote strikes or engage in activities inimical to the security of the United States. The government argues that it does not have to prove these elements. All it has to prove, under the statute, are the following four facts:

(1) An order of the Attorney General requiring the Communist Party of America to register as a Communist-Action group;

(2) Designation of Todd Shipyards as a defense facility by the Secretary of Defense;

(3) Knowledge on the part of Robel that the shipyard had been designated as a defense facility and knowledge that the Attorney General had ordered the Party to register; and

(4) Membership of Robel in the Communist Party.

From the confluence of these four factors alone criminal guilt (supposedly) flows. In other words, it is argued that the defendant is criminally liable regardless of whether he is an active or passive member of the Party, regardless of whether he believes and subscribes to a few, most, or all of the Party's aims, and regardless of whether he personally has any intent to act adversely to the government's interests.

Throughout its brief the government contends that membership in the Communist Party is not, without more, a crime. Nevertheless, the defendant here subjects himself to the full penalties of the statute unless he either relinquishes his employment with the shipyard or resigns from the Party. Giving up his employment, we may assume, would mean a severe hardship, possibly involving the loss of valuable seniority rights. Thus, the only financially acceptable choice is resignation from the Party, although he has the lawful right to be a member. But the government contends he does not have a right to continue working at the shipyard and remain a member of the Communist Party - this is a crime. It is a crime not because of anything Robel has done but because the large group of which he is a member has been administratively adjudicated to have certain unlawful purposes. If all of Robel's activities remain unchanged - except that he gives up his Party membership - then there is no guilt; no crime is committed. Still, the government contends that being a Communist is not criminal. Whatever the precise element that Party membership contributes to criminality it is undeniably the central fact upon which guilt will depend in this case. And when criminal guilt is dependent upon a person's association with a large class of people, questions of First Amendment freedoms and due process under the Fifth Amendment hover in the background, and the indictment must be strictly construed.

An examination of *Scales v. United States* (1961) 367 U.S. 203 and *Noto v. United States* (1961) 367 U.S. 290 in connection with the recent cases of *Aptheker v. Secretary*

of State (1964) 378 U.S. 500, and *Brown v. United States*, supra, (1965) 381 U.S. 437 convinces me that the indictment does not charge an offense against the United States.

The government contends without reservation that the indictment need not allege nor prove the defendant was an active or participating member of the Communist Party with knowledge of its unlawful purposes and a specific intent to advance such purposes. It is true that the statute does not explicitly so provide or require. This omission may ultimately serve to render subsection 5 of the Act here under consideration (50 U.S.C. § 784(a)) unconstitutional as it did with respect to section 6 of the Act (50 U.S.C. § 785). *Aptheker v. Secretary of State*, supra, at page 511, footnote 9. Certainly if this likely constitutional infirmity is to be overcome the requirements of active membership and specific intent must be deemed implicitly in the statute. *Scales v. United States*, 367 U.S. 203, supra, page 220 and footnote 11, page 221.

The indictment does not charge specifically or by inference either of the essential elements of active and knowing membership nor specific intent and the government does not so contend.

The nexus of guilt between a group and one of its members must depend on links more numerous and more substantial than those charged by the government. supra.

It is therefore ORDERED that the indictment be and is hereby DISMISSED.

DATED October 4, 1965.

WILLIAM J. LINDBERG
United States District Judge

APPENDIX B
[Statute Involved]

The Subversive Activities Control Act, 64 Stat. 987, 50 U.S.C. 781 ff., as amended, provides in part as follows:

DEFINITIONS

Sec. 3 [50 U.S.C. 782]. For the purposes of this title—

* * *

(3) The term "Communist-action organization" means—

(a) any organization in the United States (other than a diplomatic representative or mission of a foreign government accredited as such by the Department of State) which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 of this title, and (ii) operates primarily to advance the objectives of such world Communist movement as referred to in section 2 of this title;

* * *

(5) The term "Communist organization" means any Communist-action organization, Communist-front organization, or Communist-infiltrated organization.

* * *

(7) The term "facility" means any plant, factory or other manufacturing, producing or service establishment, airport, airport facility, vessel, pier, water-front facility, mine, railroad, public utility, laboratory, station, or other establishment or facility, or any part, division, or department of any of the foregoing. The term "defense facility" means any fa-

cility designated and proclaimed by the Secretary of Defense pursuant to section 5 (b) of this title and which is in compliance with the provisions of such subsection respecting the posting of notice of such designation.

* * *

EMPLOYMENT OF MEMBERS OF COMMUNIST ORGANIZATIONS

Sec. 5 [50 U.S.C. 784]. (a) When a Communist organization, as defined in paragraph (5) of section 3 of this title, is registered or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful—

(1) For any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

(A) in seeking, accepting, or holding any nonelective office or employment under the United States, to conceal or fail to disclose the fact that he is a member of such organization; or

(B) to hold any nonelective office or employment under the United States; or

(C) in seeking, accepting, or holding employment in any defense facility, to conceal or fail to disclose the fact that he is a member of such organization; or

(D) if such organization is a Communist-action organization, to engage in any employment in any defense facility; or

(E) to hold office or employment with any labor organization, as that term is defined in section 2(5) of the National Labor Relations Act, as amended (29 U.S.C. 152), or to represent any employer in any matter or proceeding arising or pending under that Act.

(2) For any officer or employee of the United States or of any defense facility, with knowledge or notice that such organization is so registered or that such order has become final—

(A) to contribute funds or services to such organization; or

(B) to advise, counsel or urge any person, with knowledge or notice that such person is a member of such organization, to perform, or to omit to perform, any act if such act or omission would constitute a violation of any provision of subparagraph (1) of this subsection.

(b) The Secretary of Defense is authorized and directed to designate facilities, as defined in paragraph (7) of section 3 of this title, with respect to the operation of which he finds and determines that the security of the United States requires the application of the provisions of subsection (a) of this section. The Secretary shall promptly notify the management of any facility so designated, whereupon such management shall immediately post conspicuously notice of such designation in such form and in such place or places as to give notice thereof to all employees of, and to all applicants for employment in, such facility. Such posting shall be sufficient to give notice of such designation to any person subject thereto or affected thereby. Upon the request of the Secretary, the management of any facility so designated shall require each employee of the facility, or any part thereof, to sign a statement that he knows that the facility has, for the purposes of this title, been designated by the Secretary under this subsection.

DENIAL OF PASSPORTS TO MEMBERS OF COMMUNIST ORGANIZATIONS

Sec. 6 [50 U.S.C. 785]. (a) When a Communist organization as defined in paragraph (5) of section 3 of this

title is registered, or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful for any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

(1) to make application for a passport, or the renewal of a passport, to be issued or renewed by or under the authority of the United States; or

(2) to use or attempt to use any such passport.

(b) When an organization is registered, or there is in effect a final order of the Board requiring an organization to register, as a Communist-action organization, it shall be unlawful for any officer or employee of the United States to issue a passport to, or renew the passport of, any individual knowing or having reason to believe that such individual is a member of such organization.

* * *

USE OF THE MAILS AND INSTRUMENTALITIES OF INTERSTATE OR FOREIGN COMMERCE

Sec. 10 [50 U.S.C. 789]. It shall be unlawful for any organization which is registered under section 7, or for any organization with respect to which there is in effect a final order of the Board requiring it to register under section 7, or determining that it is a Communist-infiltrated organization, or for any person acting for or on behalf of any such organization—

(1) to transmit or cause to be transmitted, through the United States mails or by any means or instrumentality of interstate or foreign commerce, any publication which is intended to be, or which it is reasonable to believe is intended to be, circulated or disseminated among two or more persons, unless such publication, and any envelope, wrapper, or other container in which it is mailed or other-

wise circulated or transmitted, bears the following, printed in such manner as may be provided in regulations prescribed by the Attorney General, with the name or the organization appearing in lieu of the blank: "Disseminated by ————————, a Communist organization"; or

(2) to broadcast or cause to be broadcast any matter over any radio or television station in the United States, unless such matter is preceded by the following statement, with the name of the organization being stated in place of the blank: "The following program is sponsored by ————————, a Communist organization".

* * *

PENALTIES

Sec. 15 [50 U.S.C. 794]. (a) If there is in effect with respect to any organization or individual a final order of the Board requiring registration under section 7 or section 8 of this title—

(1) such organization shall, upon conviction of failure to register, to file any registration statement or annual report, or to keep records as required by section 7, be punished for each such offense by a fine of not more than $10,000, and

(2) each individual having a duty under subsection (h) of section 7 to register or to file any registration statement or annual report on behalf of such organization, and each individual having a duty to register under section 8, shall, upon conviction of failure to so register or to file any such registration statement or annual report, be punished for each such offense by a fine of not more than $10,000, or imprisonment for not more than five years, or by both such fine and imprisonment.

* * *

(c) * * * Any individual who violates any provision of sections 5, 6, or 10 of this title shall, upon conviction thereof, be punished for each such violation by a fine of not more than $10,000 or by imprisonment for not more than five years, or by both such fine and imprisonment.

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CITATIONS

216-062—66

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1107

UNITED STATES OF AMERICA, APPELLANT

v.

EUGENE FRANK ROBEL

ON CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION TO MOTION TO AFFIRM

OPINIONS BELOW

The district court's memorandum opinion dismissing the indictment (Motion to Affirm, App. A, pp. 19–23) is not yet officially reported. The court of appeals wrote no opinion in certifying the appeal to this Court.

JURISDICTION

On October 4, 1965, the district court dismissed the indictment on the ground that active and knowing membership in a Communist-action organization and specific intent to further its unlawful purposes are essential elements of the offense defined in Section 5(a)(1)(D) of the Subversive Activities Control Act

of 1950, 50 U.S.C. 784(a)(1)(D), which appellee was charged with having violated. The government filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit on November 2, 1965. On the government's unopposed motion, the court of appeals certified the appeal to this Court on February 28, 1966. Jurisdiction of this Court is invoked under 18 U.S.C. 3731 in that the district court's order dismissing the indictment was "based upon the * * * construction of the statute upon which the indictment * * * is founded."

QUESTIONS PRESENTED

1. Whether active membership in a Communist-action organization, knowledge of its unlawful purposes and specific intent to further them are essential elements of the offense defined in Section 5(a)(1)(D) of the Subversive Activities Control Act of 1950, 50 U.S.C. 784(a)(1)(D).

2. Whether, if the first question is answered in the negative, Section 5(a)(1)(D) is constitutional.

STATUTE INVOLVED

The Subversive Activities Control Act of 1950, 64 Stat. 987, 50 U.S.C. 781 *ff.*, as amended, provides in pertinent part:

> Sec. 3. For the purposes of this title—
>
> (3) The term "Communist-action organization" means—
>
> (a) any organization in the United States (other than a diplomatic representative or mission of a foreign government accredited as such by the Department of State) which (i) is

substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 of this title, and (ii) operates primarily to advance the objectives of such world Communist movement as referred to in section 2 of this title; * * *

* * * * *

(5) The term "Communist organization" means any Communist-action organization, Communist-front organization, or Communist-infiltrated organization.

* * * * *

(7) The term "facility" means any plant, factory or other manufacturing, producing or service establishment, airport, airport facility, vessel, pier, water-front facility, mine, raiload, public utility, laboratory, station, or other establishment or facility, or any part, division, or department of any of the foregoing. The term "defense facility" means any facility designated by the Secretary of Defense pursuant to section 5(b) of this title and which is in compliance with the provisions of such subsection respecting the posting of notice of such designation.

* * * * *

Sec. 5(a) When a Communist organization, as defined in paragraph (5) of section 3 of this title, is registered or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful—

(1) For any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

(A) in seeking, accepting, or holding any nonelective office or employment under the United States, to conceal or fail to disclose the fact that he is a member of such organization; or

(B) to hold any nonelective office or employment under the United States; or

(C) in seeking, accepting, or holding employment in any defense facility, to conceal or fail to disclose the fact that he is a member of such organization; or

(D) if such organization is a Communist-action organization, to engage in any employment in any defense facility; or

(E) to hold office or employment with any labor organization, as that term is defined in section 2(5) of the National Labor Relations Act, as amended (29 U.S.C. 152), or to represent any employer in any matter or proceeding arising or pending under that Act.

(2) * * *

* * * * *

(b) The Secretary of Defense is authorized and directed to designate facilities, as defined in paragraph (7) of section 3 of this title, with respect to the operation of which he finds and determines that the security of the United States requires the application of the provisions of subsection (a) of this section. The Secretary shall promptly notify the management of any facility so designated, whereupon such management shall immediately post conspicuously notice of such designation in such form and in such place or places as to give notice thereof to all employees of, and to all applicants for employment in, such facility.

> Such posting shall be sufficient to give notice of such designation to any person subject thereto or affected thereby. Upon the request of the Secretary, the management of any facility so designated shall require each employee of the facility, or any part thereof, to sign a statement that he knows that the facility has, for the purposes of this title, been designated by the Secretary under this subsection.

STATEMENT

On May 21, 1963, appellee was charged in a one-count indictment filed in the United States District Court for the Western District of Washington with having violated Section 5(a)(1)(D) of the Subversive Activities Control Act of 1950, 50 U.S.C. 784(a)(1)(D). The indictment alleged (1) that a final order of the Subversive Activities Control Board in which the Communist Party of the United States of America was ordered to register as a "Communist-action organization" had been outstanding since October 20, 1961; (2) that the Secretary of Defense had, on August 20, 1962, designated the Todd Shipyards Corporation in Seattle, Washington, as a defense facility under Section 5(b) of the Subversive Activities Control Act of 1950, 50 U.S.C. 784(b); (3) that appellee had thereafter "unlawfully and willfully engage[d] in employment" at the Todd Shipyards Corporation; (4) that appellee had done so "while at the same time being a member of the Communist Party of the United States of America"; (5) that he had "knowledge and notice" of both the order of the Subversive Activities Control Board and the designation of the Secretary of Defense.

Appellee challenged the constitutionality of Section 5(a)(1)(D) and moved to dismiss the indictment on constitutional and other grounds. The material issues were argued orally and in briefs submitted to the district court. On October 4, 1965, the district court dismissed the indictment with a memorandum opinion which noted that the indictment had failed to allege that appellee was "an active member of the Party, or that he is acting or has acted or intends to act to further the unlawful purposes of the Party" (Motion to Affirm, App. A., p. 21). The court observed that "[t]he government argues that it does not have to prove these elements" (*ibid.*), and that the "government contends without reservation that the indictment need not allege nor prove the defendant was an active or participating member of the Communist Party with knowledge of its unlawful purposes and a specific intent to advance such purposes" (Motion to Affirm, App. A, p. 23). The court held, however, that because constitutional difficulties would be presented if the statute were construed in accordance with the government's position, "the requirements of active membership and specific intent must be deemed implicitly in the statute" (*ibid.*).

ARGUMENT

1. The district court's opinion reveals, we believe, that the district court's order dismissing the indictment was "based upon the * * * construction" of Section 5(a)(1)(D)—"the statute upon which the indictment * * * is founded"—within the meaning of the Criminal Appeals Act, 18 U.S.C. 3731. The cen-

tral difference between the view urged by the government and the view adopted by the court concerned the essential elements of the statutory offense. The government argued that Congress did not intend to require proof of active membership, knowledge of unlawful purposes, or specific intent to further such purposes; the court held that, properly construed, Section 5(a)(1)(D) renders employment in a defense facility criminal only if the employee is an active member of a Communist-action organization with knowledge of the organization's unlawful purposes and with the intent of furthering these purposes in his employment.

In sum, we disagree with the district court not as to what need be alleged in the indictment nor as to the meaning of any particular allegation, but with respect to the interpretation of the statute. In this case, as in *United States* v. *Braverman,* 373 U.S. 405, the government represented to the district court that it did not intend to prove an element which was not alleged in the indictment and which the court believed to be essential to the commission of the statutory offense. See 373 U.S. at 405–406. Although the district court's opinion occasionally alludes to the indictment's failure to make specific allegations regarding the contested elements, the decision rests, we submit, entirely on a construction of Section 5(a)(1)-(D). Consequently, the government's appeal was properly certified to this Court under 18 U.S.C. 3731.

2. Appellee has moved to affirm the judgment of the district court summarily not for the reasons given by the court—*i.e.*, the construction of Section

5(a)(1)(D)—but on constitutional grounds. While we agree that the constitutional questions are not insubstantial, particularly in light of this Court's recent decision in *Elfbrandt* v. *Russell,* No. 656, this Term, decided April 18, 1966, we submit that both the statutory and constitutional issues warrant plenary consideration.

The statute involved in this case makes it a criminal offense for a member of an organization which has been determined by the Subversive Activities Control Board to be a "Communist-action" organization to seek, accept or hold employment in any facility designated by the Secretary of Defense as a "defense facility." The form and language of Section 5 is very similar to the section immediately following it in the Subversive Activities Control Act of 1950—Section 6, 50 U.S.C. 785. In *Aptheker* v. *Secretary of State,* 378 U.S. 500, this Court refused to read Section 6, which prohibited the use of passports by members of Communist organizations, as incorporating the elements which the district court read into Section 5 in this case. Notwithstanding the fact that the absence of these elements rendered the statute unconstitutional, this Court held that the language and legislative history of Section 6 foreclosed any such limiting construction. 378 U.S. at 511, n. 9. We submit the same reasons compel the conclusion that it was not Congress' desire to limit the prohibitions enumerated in Section 5 to persons who know of and have the specific intent to further the unlawful purposes of the Communist organizations to which they belong.

The district court in this case imported into Section

5(a)(1)(D) the active membership, knowledge and specific intent requirements which this Court found in the "membership clause" of the Smith Act (18 U.S.C. 2385) in *Scales* v. *United States,* 367 U.S. 203, 221–228. In so doing, it not merely construed Section 5 contrary to its language and history, but it rendered the entire statutory provision superfluous. For, if all the elements needed to prove a violation of the "membership clause" of the Smith Act must be proved to establish a violation of Section 5 of the Subversive Activities Control Act of 1950, the latter statute serves no apparent purpose. We submit that it was Congress' intention to bar from employment in defense facilities, in the interest of national security, not merely individuals who could be successfully prosecuted under the membership clause of the Smith Act, but any person who is a member of a Communist-action organization and who knows that the organization has been found to be such by the Subversive Activities Control Board and that the facility where he is employed or seeks employment has been specially designated by the Secretary of Defense.[1]

[1] We note, in addition, that the three elements deemed essential by the district court are by no means inseverable. Section 5(a)(1)(D) might be construed to require proof of one or, at most, two of these elements—*i.e.*, active membership and knowledge of unlawful purposes—but not proof of specific intent to further those unlawful ends. For purposes of this appeal, we concede that the essential characteristics of membership must be alleged and that the instant indictment, which failed to specify any of these three contested elements, was properly dismissed if any of them is a required ingredient of the offense. Nevertheless, since the district court decided that each of these ingredients was a prerequisite to conviction under

3. If the Court agrees with the construction of the statute which we urge, it will be, of course, free on this appeal to go on to consider appellee's constitutional challenges to Section 5(a)(1)(D), so construed. *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 329–330; *United States* v. *Spector*, 343 U.S. 169, 172; Stern & Gressman, *Supreme Court Practice* (1954 ed.) p. 26. The constitutional issues plainly warrant more than summary consideration. Unlike *Aptheker* v. *Secretary of State*, 378 U.S. 500, on which appellee relies (Motion to Affirm, pp. 5–8), this case does not involve a liberty as "basic in our scheme of values" (*Kent* v. *Dulles*, 357 U.S. 116, 126) as the right to travel. In Section 5(a)(1)(D) Congress was attempting to protect national security by limiting access to facilities in which classified defense information is available. Access to such locations cannot be compared to the freedom to travel abroad, and the governmental interest in regulating such access is obviously much greater than the interest in restricting travel by those who may be disloyal.

Nor do any of appellee's subsidiary constitutional claims warrant summary affirmance. The argument that appellee cannot constitutionally be bound by the administrative finding of the Subversive Activities Control Board with respect to the character of the Communist Party (Motion to Affirm, pp. 11–13, 14–17) is inconsistent with *Yakus* v. *United States*, 321

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the statute, and since the same issues would recur if the dismissal were affirmed on any one of the district court's grounds, it would seem appropriate for the Court to determine, on this appeal, which, if any, are necessary elements of the crime.

U.S. 414, and *Cox* v. *United States*, 332 U.S. 442. Moreover, that contention is an inappropriate ground on which to affirm the dismissal of an indictment. The nature of the government's proof with regard to the organization to which appellee belongs is a matter to be considered during and after the trial (if there is a conviction). Appellee's supposition that he will be precluded at trial from contesting "stale" determinations is plainly premature. And the claim that Section 5(a)(1)(D) is a bill of attainder within the meaning of this Court's decision in *United States* v *Brown*, 381 U.S. 437 (Motion to Affirm, pp. 13–14), overlooks the fact that this statute, unlike the one in *Brown*, does not mention the Communist Party by name. Indeed, in the *Brown* decision this Court observed that "the Subversive Activities Control Act did not name the Communist Party but rather set forth a broad definition, which would permit the Party to escape the prescribed deprivations in the event its character changed." 381 U.S. at 452, n. 26.

CONCLUSION

For the foregoing reasons, we respectfully submit that probable jurisdiction should be noted.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 83

UNITED STATES OF AMERICA, APPELLANT

v.

EUGENE FRANK ROBEL

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The district court's memorandum opinion dismissing the indictment (R. 5-9) is not officially reported. The court of appeals wrote no opinion in certifying the appeal to this Court (R. 15-16).

JURISDICTION

On October 4, 1965, the district court dismissed the indictment on the ground that active and knowing membership in a Communist-action organization and

specific intent to further its unlawful purposes are essential elements of the offense defined in Section 5(a)(1)(D) of the Subversive Activities Control Act of 1950, 50 U.S.C. 784(a)(1)(D), which appellee was charged with having violated. The government filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit on November 2, 1965. On the government's unopposed motion, the court of appeals certified the appeal to this Court on February 28, 1966, and this Court noted probable jurisdiction on May 16, 1966 (R. 16; 384 U.S. 937). Jurisdiction of this Court is invoked under 18 U.S.C. 3731 because the district court's order dismissing the indictment was "based upon the * * * construction of the statute upon which the indictment * * * is founded."

QUESTIONS PRESENTED

1. Whether active membership in a Communist-action organization, knowledge of its unlawful purposes and specific intent to further them are essential elements of the offense defined in Section 5(a)(1)(D) of the Subversive Activities Control Act of 1950, 50 U.S.C. 784(a)(1)(D).

2. Whether, if the first question is answered in the negative, Section 5(a)(1)(D) is constitutional.

STATUTE INVOLVED

The Subversive Activities Control Act of 1950, 64 Stat. 987, as amended, 50 U.S.C. 781, *et seq.*, provides in pertinent part:

Sec. 3. For the purposes of this title—

* * * *

(3) The term "Communist-action organization" means—

(a) any organization in the United States (other than a diplomatic representative or mission of a foreign government accredited as such by the Department of State) which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 of this title, and (ii) operates primarily to advance the objectives of such world Communist movement as referred to in section 2 of this title; * * *

* * * *

(5) The term "Communist organization" means any Communist-action organization, Communist-front organization, or Communist-infiltrated organization.

* * * *

(7) The term "facility" means any plant, factory or other manufacturing, producing or service establishment, airport, airport facility, vessel, pier, water-front facility, mine, railroad, public utility, laboratory, station, or other establishment or facility, or any part, division, or department of any of the foregoing. The term "defense facility" means any facility designated by the Secretary of Defense pursuant to section 5(b) of this title and which is in compliance with the provisions of such subsection respecting the posting of notice of such designation.

* * * *

Section 5(a). When a Communist organization, as defined in paragraph (5) of section 3 of this title, is registered or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful—

(1) For any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

(A) in seeking, accepting, or holding any nonelective office or employment under the United States, to conceal or fail to disclose the fact that he is a member of such organization; or

(B) to hold any nonelective office or employment under the United States; or

(C) in seeking, accepting, or holding employment in any defense facility, to conceal or fail to disclose the fact that he is a member of such organization; or

(D) if such organization is a Communist-action organization, to engage in any employment in any defense facility; or

* * * * *

(2) * * *

* * * * *

(b) The Secretary of Defense is authorized and directed to designate facilities, as defined in paragraph (7) of section 3 of this title, with respect to the operation of which he finds and determines that the security of the United States requires the application of the provisions of subsection (a) of this section. The Secretary shall promptly notify the management of any facility so designated, whereupon such management shall immediately post conspicuously notice of such

> designation in such form and in such place or places as to give notice thereof to all employees of, and to all applicants for employment in, such facility. Such posting shall be sufficient to give notice of such designation to any person subject thereto or affected thereby. Upon the request of the Secretary, the management of any facility so designated shall require each employee of the facility, or any part thereof, to sign a statement that he knows that the facility has, for the purposes of this title, been designated by the Secretary under this subsection.

The pertinent portion of 50 U.S.C. 794, the penalty provision, reads:

> (c) * * * Any individual who violates any provision of [section 5] * * * of this title shall, upon conviction thereof, be punished for each such violation by a fine of not more than $10,000 or by imprisonment for not more than five years, or by both such fine and imprisonment.

STATEMENT

On May 21, 1963, appellee was charged in a one-count indictment filed in the United States District Court for the Western District of Washington with having violated Section 5(a)(1)(D) of the Subversive Activities Control Act of 1950, 50 U.S.C. 784 (a)(1)(D). The indictment alleged (1) that a final order of the Subversive Activities Control Board directing the Communist Party of the United States of America to register as a "Communist-action organization" had been in effect since October 20, 1961; (2) that the Secretary of Defense had, on August 20,

1962, designated the Todd Shipyards Corporation in Seattle, Washington, as a defense facility under Section 5(b) of the Subversive Activities Control Act of 1950, 50 U.S.C. 784(b); (3) that from November 19, 1962 and continuously to the date of indictment appellee had "unlawfully and willfully engage[d] in employment" at the Todd Shipyards Corporation "while at the same time being a member of the Communist Party of the United States of America" and having "knowledge and notice" of both the order of the Subversive Activities Control Board and the designation of the Secretary of Defense (R. 1-2).

Appellee moved on June 5, 1963, to dismiss the indictment on constitutional and other grounds (R. 3-5). On October 4, 1965, with a memorandum opinion, the district court dismissed the indictment because it failed to allege that appellee was "an active member of the Party, or that he is acting or has acted or intends to act to further the unlawful purposes of the Party" (R. 7). The court expressed the view that if the requirements of active membership and specific intent were not "deemed implicitly in the statute" (R. 9), Section 5(a)(1)(D) would encounter constitutional difficulties. It held, therefore, that an indictment under this statute must allege, and the government must prove at trial, that "the defendant was an active or participating member of the Communist Party with knowledge of its unlawful purposes and a specific intent to advance such purposes" (R. 9). The government appealed to the Court of Appeals for the Ninth Circuit which, on the government's motion, certified the appeal to this Court (R. 10-16).

INTRODUCTION AND SUMMARY OF ARGUMENT

While recognizing that Section 5(a)(1)(D) does not "explicitly * * * provide or require" (R. 9) proof of appellee's knowledge of the Communist Party's unlawful purposes, his "active" membership in the Party, or his "specific intent" to further its unlawful objectives, the district court read these requirements into the statute to "overcome" constitutional difficulties (*ibid.*). These elements were borrowed by the district court from the membership clause of the Smith Act, 18 U.S.C. 2385, as construed by this Court in *Scales* v. *United States*, 367 U.S. 203. Our basic position is that a straightforward construction of the present statute does not raise the constitutional doubts which suggested a reading of the membership clause of the Smith Act to include the elements of active membership and specific intent.[1] And we think it plain that if ordinary principles of statutory construction, rather than those peculiarly applicable to provisions which are constitutionally dubious, are applied to Section 5(a)(1)(D), the provision cannot be read as requiring the elements which the district court prescribed in this case.

Our Argument first discusses the constitutional question because it is clear from the opinion below that the district judge felt constrained to interpret Section 5(a)(1)(D) as he did to save it from con-

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[1] The third element—knowledge of unlawful purposes—is expressly provided in the Smith Act itself. See 18 U.S.C. 2385: "Whoever * * * becomes or is a member of, or affiliates with, any such society, group or assembly of persons, knowing the purposes thereof * * *."

stitutional challenge. We argue that Section 5(a)(1)(D) is a permissible prophylactic measure designed to regulate those who have access to facilities which are essential to the national security. By prohibiting individuals who are members of Communist-action organizations from engaging in employment in defense plants, Congress was not imposing a punishment on account of membership in an organization—as a prosecution under the membership clause of the Smith Act would do. Rather, Congress was legislating to prevent substantial anticipated dangers—espionage or sabotage in defense facilities.

We recognize, of course, that Communist-action organizations may pursue lawful goals as well as unlawful ones, and that when Congress deals with the menace of Communist subversion it must be particularly cautious not to impinge upon the constitutionally protected liberties of those who adhere only to the lawful aims of such organizations. But that responsibility does not invalidate every legislative act concerning Communist activity which may conceivably reach beyond the most immediate or obvious danger. Among the elements which must be weighed in judging the propriety of a particular exercise of legislative power in this area is the gravity of the harm which Congress sought to prevent. In this case, unlike others in which provisions of the federal internal security laws have been challenged and declared unconstitutional, the potential injury is very serious. Consequently, Congress' remedy—although it might be deemed overbroad if it related to other dangers—is, in light of the seriousness of this particular risk, a

permissible exercise of "the right of self-preservation, 'the ultimate value of any society.'" *Barenblatt* v. *United States*, 360 U.S. 109, 128, quoting from *Dennis* v. *United States*, 341 U.S. 494, 509.

I

A. We argue first that Congress was exercising its war powers when it enacted Section 5(a)(1)(D) to restrict access to defense facilities. This provision was intended as part of a loyalty-security program which had been found necessary during World War II and was continued in the post-war national emergency periods. The dangers of sabotage and espionage in defense facilities were brought home to Congress in various legislative investigations. Although there were differences as to how the end could best be achieved, it was generally agreed by the President, representatives of Executive departments and Congress that greater precautions would have to be taken to insure that disloyal employees did not have access to installations on which the national defense depended. Section 5(a)(1)(D) was a response to this need, and it has been administered by the Secretary of Defense in a manner consistent with that limited purpose.

B. We then show that Congress acted reasonably when it chose these means to secure defense facilities against sabotage and espionage. The existence of criminal statutes dealing with acts of sabotage and espionage in defense plants could properly be regarded as inadequate protection for these vital facilities. There are obvious difficulties in detecting the persons guilty of espionage or sabotage, and a statute "pun-

ishing the act" rather than "remov[ing] the threat" (*American Communications Association* v. *Douds*, 339 U.S. 382, 406) may be deemed insufficient if the risk is great enough. Nor was Congress obliged to be satisfied with the "industrial security" program as it had theretofore developed. That program did not reach all facilities in which the threat of harm to the national security was presented. And pre-employment clearance is not nearly as feasible when a private employer's work force is being cleared as when government employment is involved.

Congress also acted reasonably when it concluded, in light of its findings regarding the international Communist conspiracy, that all members of a "Communist-action" group who choose to retain their membership after being notified of the group's obligation to register raise a sufficient doubt of their loyalty to warrant their disqualification from defense-facility employment. When the danger is as great as it is here, the test should not be whether disloyalty has been proved but whether there is a sufficient doubt of loyalty to warrant denial of access to defense plants. That was the standard used in the loyalty-security programs developed during and after World War II, and it was properly used as the premise for the legislation including Section 5(a)(1)(D).

We also argue that the criminal sanction was a reasonable and permissible means of implementing Congress' prohibition. The district court erred in assuming that by enacting this kind of conflict-of-interest statute, Congress was punishing membership in "Communist-action" groups.

C. We show finally that Section 5(a)(1)(D) does not violate the First Amendment because it concerns a much greater governmental interest and a lesser interference with private rights than were involved in other cases in which this Court passed upon statutes affecting members of Communist organizations. Neither *Aptheker* v. *Secretary of State*, 378 U.S. 500, nor *Scales* v. *United States*, 367 U.S. 203, supports the contention that Section 5(a)(1)(D) is unconstitutional as written.

II

A. The language and legislative history of Section 5(a)(1)(D) totally fail to provide any basis for the district court's construction of the provision as requiring allegations and proof of knowledge, active membership and specific intent. Indeed, the very same language is used in Section 5 to describe the class to which that Section's prohibitions apply as is used in Section 6, which deals with the use of passports by members of Communist organizations. In *Aptheker* v. *Secretary of State*, 378 U.S. 500, 511, this Court refused to read the elements of active membership and specific intent into Section 6, notwithstanding the fact that the Court was consequently compelled to hold the Section unconstitutional on its face. It follows that the construction given Section 5(a)(1)(D) by the district court in this case was plainly impermissible.

B. Section 5(a)(1)(D) was designed as a prophylactic statute, to remove the threat presented by employees of defense facilities whose loyalty was in

doubt. The district court's reading of the statute limits its application to those who may be successfully prosecuted under the membership clause of the Smith Act, 18 U.S.C. 2385. It thereby deprives the provision of all its preventive effect by leaving it in force only against those whose disloyalty can be demonstrated beyond a reasonable doubt. This, we submit, is plainly contrary to the legislative purpose.

ARGUMENT

I

Section 5(a)(1)(D) is Constitutional as Written

Section 5(a)(1) of the Subversive Activities Control Act of 1950, 50 U.S.C. 784(a)(1), enumerates various prohibitions imposed by the Act upon "any member" of a Communist-action or Communist-front organization who has "knowledge or notice" of the organization's registration under the Act or of a final order of the Subversive Activities Control Board directing the organization to register. The fourth of these prohibitions—subsection (D)—is the one which appellee was charged with having violated in this case. Subsection (D) makes it unlawful for any member of a Communist-action organization "to engage in any employment in any defense facility" (p. 4, *supra*). Section 15(c) of the Act, 50 U.S.C. 794(c), imposes a maximum sentence of five years' imprisonment and a $10,000 fine for violation of the provisions of Section 5.

The one-count indictment in which appellee was charged alleged the following elements of the offense:

1. That the Communist Party of the United States of America was under a final order to register as a Communist-action organization.
2. That Todd Shipyards was designated by the Secretary of Defense as a defense facility.
3. That appellee was a member of the Communist Party of the United States of America.
4. That appellee had "knowledge and notice" of the order requiring the Communist Party to register.
5. That appellee had "knowledge and notice" of the Secretary of Defense's designation of Todd Shipyards as a defense facility.
6. That appellee "unlawfully and willfully" engaged in employment at Todd Shipyards while he had such knowledge.

These are the only elements expressly set out in the statute and they are, in our view, sufficient to establish the commission of the offense. The district court held that Section 5(a)(1)(D) could not be literally construed without making it constitutionally vulnerable. We believe, for the reasons stated below, that Congress has the constitutional power to bar, under pain of criminal sanction, a class of individuals identified by their voluntary association with a foreign-dominated conspiracy from employment in a defense facility.

The district court, we submit, arrived at the conclusion that Section 5(a)(1)(D) was constitutionally dubious because it judged the provision as if it were a punishment imposed on members of subversive organizations. That characterization—which might justify application of the principles of construction applied by this Court in *Scales* v. *United States*, 367

U.S. 203—misapprehends the purpose and effect of the legislation. A more precise examination of this provision of the 1950 statute in the context of Congress' expressed concern with the security of defense facilities demonstrates that Section 5(a)(1)(D) was designed to protect essential defense installations against sabotage and espionage. Its constitutional validity must be judged not solely by the standards applied in decisions of this Court involving legislative efforts to deal with Communist subversion and aggression in this country but by the principle applicable to Congress' exercise of the war power. We submit that, in light of those standards, Section 5(a)(1)(D) is constitutional as written.

A. *In this provision Congress exercised its broad constitutional powers to secure defense facilities against espionage and sabotage.*

In *Hirabayashi* v. *United States*, 320 U.S. 81, 93, this Court commented upon the breadth of the "war power" conferred upon Congress by Art. I, Sec. 8 of the Constitution:

> It extends to every matter and activity so related to war as substantially to affect its conduct and progress. The power is not restricted to the winning of victories in the field and the repulse of enemy forces. It embraces every phase of the national defense, including the protection of war materials and the members of the armed forces from injury and from the dangers which attend the rise, prosecution and progress of war. * * *

See also *Lichter* v. *United States*, 334 U.S. 742, 754-772; cf. *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144.

Section 5(a)(1)(D) is a legislative provision aimed at "the protection of war materials." By means of a criminal statute Congress has, in effect, limited the class of those who have access to military and civilian plants which produce military equipment or which provide services essential to the defense industry. Section 5(a)(1)(D) is, in short, part and parcel of the federal civilian loyalty-security program which is designed to prevent espionage and sabotage within the federal government and in defense installations. It was a natural development in 1950 of the growing concern shown by the executive and legislative branches of government over the risks of internal subversion in plants on which the national defense depended. The underlying problem, however, is much older.

During World War I Congress' attention was drawn to the dangers of sabotage in facilities which, while under civilian control, were essential to the country's war effort and to its defense. The Act of April 20, 1918 (Sabotage Act), 40 Stat. 533, made it a criminal offense to destroy "any war material, war premises, or war utilities" or willfully to make any "war material" in a defective manner. See 18 U.S.C. 2153, 2154. "War premises" was defined to include privately owned facilities where "war material"—*i.e.*, any articles "intended for, adapted to, or suitable for * * * use * * * in connection with the conduct of war or defense activities"—was being produced, manufactured or stored. See 18 U.S.C. 2151. Subsequent amendments to the sabotage provisions of the Criminal Code have enlarged their scope to include "national-defense"

material, premises and utilities (18 U.S.C. 2151, 2155, 2156) and have extended the original sabotage provisions dealing with "war materials" until "six months after the termination of the national emergency proclaimed by the President on December 16, 1950 * * *." 18 U.S.C. 2157(a).

No organized loyalty-security program was in effect with respect to either government employees or those employed in privately owned defense facilities until World War II. In 1939, however, Congress passed Section 9A of the Hatch Political Activity Act, 53 Stat. 1148, which declared it to be unlawful "for any person employed in any capacity by any agency of the Federal Government, whose compensation, or any part thereof, is paid from funds authorized or appropriated by any Act of Congress, to have membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States." [2] There is no indication

[2] 5 U.S.C. 118p(2) is the current version of this provision. It provides:

> No person shall accept or hold office or employment in the Government of the United States or any agency thereof, including wholly owned government corporation, who—
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> * * * * *
>
> (2) is a member of an organization that advocates the overthrow of our constitutional form of government in the United States, knowing that such organization so advocates.
>
> * * * * *

5 U.S.C. 118r provides that any person violating section 118p "shall be guilty of a felony, and shall be fined not more than $1,000 or imprisoned not more than one year and a day, or both."

in the legislative history of this provision that it was aimed at saboteurs or spies, but military agencies thereafter manifested concern over the dangers of sabotage or espionage by disloyal employees.[3] Responding to this concern, Congress gave the Secretaries of War and Navy and the Coast Guard the power summarily to remove employees who were considered risks to the national security. 54 Stat. 679, 56 Stat. 1053. In addition, Congress inserted in World War II appropriations acts the proviso that "no part of this appropriation shall be used to pay the salary or wages of any person who advocates, or who is a member of an organization that advocates, the overthrow of the Government of the United States by force or violence." See, *e.g.*, the Act of February 6, 1941 (Emergency Cargo Ship Construction Act), 55 Stat. 5, 6. Violations of the proviso were punishable by fines of not more than $1,000 and imprisonment for not more than one year. 55 Stat. 6.

During World War II the War Department concluded that preventive security precautions were necessary not merely in federal employment but also with respect to those employed by private concerns which were supplying and servicing the nation's military operations. Consequently, various "industrial security" programs[4] were established and adminis-

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[3] See Bontecou, *The Federal Loyalty-Security Program* (1953), p. 12; H. Rep. No. 2261, 76th Cong., 3d Sess. (1940); 86 Cong. Rec. 7925 (1940).

[4] "Industrial security" has been defined as (1) "that portion of internal security which is concerned with the protection of classified information in the hands of United States industry," and (2) "the protection of industrial facilities

tered by affected agencies of the federal government. These programs included the assignment of increased physical protection to defense facilities and a drive for the "[d]ischarge of subversives from private plants and war department plants privately operated of importance to Army procurement." *Report of the Commission on Government Security* (1957), p. 237. Ultimately, in the postwar period, a centralized Industrial Security Program was developed by the Department of Defense (see *id.* at 238-249; *Greene* v. *McElroy*, 360 U.S. 474, 493-494), which supervised security clearances for the approximately 3,000,000 civilian employees of contractors with military departments. See Association of the Bar of the City of New York, Report of the Special Committee on the Federal Loyalty-Security Program (1956) p. 4.

It is clear from the face of Section 5(a)(1), as it was enacted in 1950, that it was related to the loyalty-security programs which were then being consolidated within the Department of Defense. Two of the four subsections of Section 5(a)(1)—subsections (A) and (C)—provided criminal penalties for a *failure to disclose* membership in a Communist organization in applications for federal employment or for defense-facility employment. These were plainly designed to make existing clearance procedures more effective. Subsection (B) of Section 5(a)(1) restated, for all practical purposes, the proscription of Section

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which are essential to support a wartime mobilization program from loss or damage by the elements, sabotage, or other dangers arising within the United States." *Report of the Commission on Government Security* (1957), p. 236.

9A of the Hatch Political Activity Act of 1939 (p. 16, supra).[5] Section 5(a)(1)(D) — which is at issue here—was based upon a determination by Congress that it was as necessary to the national security to deny to members of Communist-action organizations access to defense facilities as it was to bar them from federal employment.

Indeed, testimony before the House Un-American Activities Committee on proposed legislation which was the basis for the Subversive Activities Control Act of 1950 makes it entirely clear that the question of whether the existing loyalty program was adequate was squarely presented to Congress. One proposed bill would have imposed criminal penalties on, *inter alia*, any federal officer or employee or "any individual employed in connection with the performance of any national defense contract" who became or remained "a member of, or affiliated with, the Communist Party of the United States of America, or any organization which shall have been designated as subversive by the Attorney General." The bill—H.R. 3903, 81st Cong., 1st Sess.—was opposed by the Department of Justice on the grounds that: (1) the

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[5] Whereas the Hatch Act prohibited membership by federal employees in any organization "which advocates the overthrow of our constitutional form of government," Section 5(a)(1)(B) prohibits their membership in any registered "Communist-action organization." In light of the findings of Section 2 and the definitions of Section 3 (50 U.S.C. 781, 782), there can hardly be any doubt that any "Communist organization" within the 1950 Act would also qualify as an organization advocating overthrow within the meaning of the Hatch Act.

limitation on private citizens who are members of the Communist Party might constitute a bill of attainder,[6] (2) the bill contained no legislative findings, and (3) there was a "world of difference * * * from the standpoint of sound policy and constitutional validity, between making, as the bill would, membership in an organization designated by the Attorney General a felony, and recognizing such membership, as does the employee loyalty program under Executive Order 9835, as merely one piece of evidence pointing to possible disloyalty."[7] *Hearings on Legislation to Outlaw Certain Un-American and Subversive Activities before the House Un-American Activities Committee*, 81st Cong., 2d Sess. (1950), pp. 2122, 2124, 2125. The Department noted, in addition, that the activities of federal employees sought to be covered by the pro-

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[6] Compare *United States* v. *Brown*, 381 U.S. 437.

[7] This expression of view was quoted by this Court in *Aptheker* v. *Secretary of State*, 378 U.S. 500, 513, n. 12. It should be noted that while membership in an organization designated by the Attorney General was, under the then outstanding Executive Order, "only * * * one factor to be weighed in determining the loyalty of an applicant or employee" (378 U.S. at 513), Section 9A of the Hatch Act made such membership conclusive if the organization advocated the "overthrow of our constitutional form of government." See p. 16, *supra*. The bill on which the Department expressed its views went beyond the standard of the Hatch Act and empowered the Attorney General to designate any organization which was "totalitarian, fascist, communist or subversive, or [had] adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or [sought] to alter the form of government of the United States by unconstitutional means."

posed bill were "restricted adequately by Section 9A of the Hatch Act" and by the then existing loyalty program. The Department's letter also expressed its belief that the Department of Defense and the Atomic Energy Commission had "adopted certain precautionary measures covering activities of employees of those holding contracts connected with the national defense." *Id.* at 2125.

Notwithstanding these views, Congress enacted a provision which went beyond the existing loyalty programs for federal employees and for employees of defense contractors. By not mentioning the Communist Party by name Congress sought to avoid the bill-of-attainder difficulty (see *United States* v. *Brown*, 381 U.S. 437; *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 86-87), and the Control Act, as passed, contained substantial legislative findings (see 50 U.S.C. 781). But Congress plainly rejected the Department's view that existing security programs were adequate to deal with espionage and sabotage by members of Communist organizations. And by defining the class of prohibited organizations much more narrowly than the proposed legislation had done and providing for a full administrative proceeding to determine the character of the organization, Congress apparently sought to meet the objection that a criminal sanction ought not to be imposed on a private citizen merely as a result of an "administrative designation" by the Attorney General (*Hearings*, *supra* at 2124).

The conclusions of the Congress which enacted the Subversive Activities Control Act in 1950 were re-

flected in the views expressed in that year's Annual Report of the House Committee on Un-American Activities, H. Rep. No. 3249, 81st Cong., 2d Sess. (1951), p. 29:

> The year 1950 has marked a new stage in the struggle against communism in the United States. The attack upon Korea makes it plain beyond all doubt that communism has passed beyond the use of subversion to conquer the independent nations and will now use armed invasion and war. With the Armed Forces of the United States actually pitted in conflict against the legions of international communism, the Communist Party of the United States can no longer be viewed passively as a group of mere political and ideological dissidents, but must be looked upon with all seriousness as a military fifth column actively aiding our enemies.
>
> Yet, today we find many of these potential fifth columnists employed in our leading defense plants, making weapons to be used against the Communist armies which they are pledged to support. To remove these persons from positions where they could sabotage our defense production there was included in the Wood-McCarran Communist-control bill a section which prohibits employment of Communist Party members in defense plants designated as such by the Secretary of Defense. The committee recommends that the Congress adopt a resolution calling upon the Secretary of Defense to immediately place in effect the provisions of section 5 of Public Law 831, Eighty-first Congress.

Congress' conclusion that the employment of members of Communist organizations in defense facilities

presented a substantial threat to the security of the nation was based upon years of legislative investigation. As early as 1941, the House Committee on Un-American Activities strongly urged "that employment in national-defense industries or the Government service be denied to any person who has been and is now active in any particular organization which is found to be under the control and guidance of a foreign government." H. Rep. No. 1, 77th Cong., 1st Sess. (1941), p. 25. This recommendation was based, in part, on investigations of the Special Committee on Un-American Activities (known as the Dies Committee) which began in 1938 to inquire into subversion in government and in essential defense industries. A "Special Report on Subversive Activities" was submitted in 1943 and it found that the "American Peace Mobilization openly aided and abetted widespread sabotage strikes in the most important American defense industries, thereby seriously hampering our national preparedness to meet just such military crises as that of Pearl Harbor." H. Rep. No. 2748, 77th Cong., 2d Sess. (1943), p. 9. The report went on to enumerate nine instances in which Communist leadership had contributed to sabotage strikes in defense industries. *Id.* at 9-10. See also H. Rep. No. 2742, 79th Cong., 2d Sess. (1947); H. Rep. No. 1920 (reporting on Public Law 601), 80th Cong., 2d Sess. (1948).

A 1949 report of the House Committee on Un-American Activities reported on the Communist espionage apparatus at work in the radiation laboratory

of the University of California at Berkeley, where work had been done on the atomic bomb. H. Rep. 1952, 81st Cong., 2d Sess. (1949); see also *Hearings Regarding Communist Infiltration of Radiation Laboratory and Atomic Bomb Project at the University of California, Berkeley, Calif. before the House Committee on Un-American Activities*, 81st Cong., 1st Sess. (1949). And President Truman, in urging the Congress to enact internal security legislation other than the Control Act which was then under legislative consideration, noted that the "dangers [of Communism] come, not from normal political activity, but from espionage, sabotage, and the building up of an organization dedicated to the destruction of our Government by violent means—against all of which we already have laws." H. Doc. No. 679, 81st Cong., 2d Sess. (1950), p. 6. The President's message accompanying his veto of the Internal Security Act of 1950 also agreed that it was necessary to "prevent espionage, sabotage, or other actions endangering our national security." H. Doc. No. 708, 81st Cong., 2d Sess. (1950), p. 6. With respect to Section 5(a)(1)(D), the President's veto message said (*id.* at 7):

> It is claimed that this bill would prohibit the employment of Communists in defense plants. The fact is that it would be years before this bill would have any effect of this nature—if it every [*sic*] would. Fortunately, this objective is already being substantially achieved under the present procedures of the Department of Defense, and if the Congress would enact one of the provisions I have recommended—which it did not

include in this bill—the situation would be entirely taken care of, promptly and effectively.[8]

The history of the legislative and executive consideration of the substance of Section 5(a)(1)(D) shows, we submit, general agreement on the proposition that substantial dangers of espionage and sabotage were presented by the employment in defense facilities of members of Communist organizations. Testimony presented to Congressional committees since the enactment of the Subversive Activities Control Act buttresses that conclusion. Illustrative is the testimony of Ralph N. Stohl, Director, Office of Domestic Security Programs, Department of Defense, who told the Subcommittee (*Hearings on S. 681 before the Subcommittee to Investigate the Administration of the Internal Security Act and other Internal Security Laws of the Senate Committee on the Judiciary*, 84th Cong., 1st Sess., p. 222):

> A Communist, as a potential saboteur, regularly employed in these vital facilities would have an excellent opportunity in many instances to become thoroughly familiar with the most essential functional areas in the plant. * * * The ways and means employed by a saboteur to inflict dam-

[8] By letter of August 8, 1950, President Truman had recommended, *inter alia*, "that the Congress remedy certain defects in the present laws concerning * * * the security of national-defense installations, * * * by giving broader authority than now exists for the President to establish security regulations concerning the protection of military bases and other national-defense installations." *Message from the President of the United States Transmitting Recommendations Relative to Preserving our Basic Liberties and to Protecting the Internal Security of the United States*, H. Doc. No. 679, 81st Cong., 2d Sess., p. 5.

age are as varied as human imagination. However, when such talents are exercised against vital areas of facilities considered highly essential to our Nation's defense, the loss can be as serious as a major military reverse. The employment of known Communists in this type of facility enhances the possibilities of sabotage. Common sense dictates the removal of such individuals from these plants.[9]

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[9] See also the testimony of Wilbur Brucker, General Counsel of the Department of Defense (later Secretary of the Army), who testified at the same hearings (pp. 8, 10):

> The need to protect this vital asset [industrial capacity] against possible sabotage or espionage is self-evident. Yet I appear before you today with the knowledge that there are known subversives now working in vital defense facilities without there being adequate authority in the Federal Government to meet this potential threat to our productive capacity and therefore to our military effectiveness.
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> * * * *
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> The history of the Communist conspiracy requires us to assume that the hard-core Communists will act to the detriment of this country by whatever means they have at their command, including sabotage, which action would coincide with surprise attack on the country. * * * If the saboteur accomplishes his mission, it is then too late.

And at *Hearings before the House Committee on Un-American Activities* entitled "Investigation of Communist Penetration of Communications Facilities—Part 2", 85th Cong., 1st Sess. (October 9, 1957), the Director of the Department of Defense's Office of Personnel Security Policy testified as follows (p. 1814):

> The Department of Defense has actively supported proposed legislation that would permit the removal of dangerous persons from facilities vital to our Nation's security. The Department cannot assure the Congress and the American people that all reasonable measures have been taken to safeguard our national security if

It was not until 1962, after this Court's decision in *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, that the Secretary of Defense was able to begin to implement the provisions of Section 5(a)(1)(D). Having obtained an amendment of the original provision which required him to list all "defense facilities" in the Federal Register (76 Stat. 91), the Secretary promulgated a classified list of "defense facilities" pursuant to the duties assigned to him by Section 5(b). The plants designated by the Secretary as "defense facilities" consisted of the following five categories (App. A, pp. 58-59, *infra*):

1. Facilities engaged in important classified military projects
2. Facilities producing important weapons systems, subassemblies and their components
3. Facilities producing essential common components, intermediates, basic materials and raw materials [10]

Communists or other subversives, regardless of what inspires them or the source of coercion to which they might be subjected, are permitted to work in these vital facilities.

[10] "Common components" are components used for both military and essential civilian activities. Transformers or circuit-breakers used in generating electric power may, for example, be put to civilian and military uses. A plant is designated as a defense facility, however, only if it actually supplies a substantial portion of its manufactured product to the military establishment. "Intermediates" are principally chemicals such as, for example, sulphuric acid. "Basic materials" are products such as petroleum, and "raw materials" refers to basic metals or minerals.

expression, section 5(A)(1)(D) has an impermissible "chilling effect" on freedom of expression.

The underlying premise of the government's defense of section 5(a)(1)(D), that we are at war with the Soviet Union in every sense but "technically," is fallacious as a matter of law and flouts our national policy.

C.

The interpretation given section 5(a)(1)(D) by the court below in order to save it is erroneous under *Aptheker v. Secretary of State.*

II.

The indictment is defective because it fails to allege that the Communist Party is a Communist-action organization.

A.

The government interprets section 5(a)(1)(D) as making an order that an organization register as a Communist-action organization conclusive of its character as such, thereby dispensing with the requirements that its actual character be alleged and proved. This interpretation is erroneous.

1. The text of section 5(a)(1)(D) makes clear that it applies only to members of organizations (a) which *are* Communist-action organizations and (b) which have registered or have been ordered to register. That this result was deliberate is confirmed by the comparative wording of other criminal provisions of the Act.

2. The government's interpretation of section 5(a)(1)(D) raises serious constitutional questions which may be avoided by adhering to the text of the statute.

a. The section, as interpreted by the government, denies appellee procedural due process. The only justi-

fication for applying the section to members of the Communist Party is that the Party is a Communist-action organization. Under the government's interpretation, appellee is concluded on this issue by the 1953 registration order against the Party, and thereby denied an opportunity to contest the factual premise on which his criminal liability depends. Appellee is entitled, at a minimum, to an opportunity to show that the Board's 1953 finding that the Communist Party was a Communist-action organization is no longer tenable. The government's interpretation of section 5(a)(1)(D) denies him that opportunity.

b. Section 5(a)(1)(D), as interpreted by the government, denies appellee the constitutional safeguards of indictment, trial by jury, and proof of guilt beyond a reasonable doubt. This is so because, under that interpretation, the determination that the Communist Party is a Communist-action organization — a fact constitutionally prerequisite to the guilt of appellee — is severed from the criminal proceeding and made administratively on the basis of a mere preponderance of the evidence.

c. Section 5(a)(1)(D), as interpreted by the government, is a bill of attainder since the determination on which the infliction of punishment depends — that the Communist Party is a Communist-action organization — is made by the Board and not judicially. So interpreted, the section is a bill of attainder for the further reason that it applies not to members of an organization having legislatively described characteristics, but to an organization specified by the Board in 1953, whether it currently fits the statutory description or not.

B.

If the government's interpretation of section 5(a)(1)(D) is accepted, the section is unconstitutional for the reasons above stated.

III.

Section 5(a)(1)(D) violates procedural due process by making designations of defense facilities by the Secretary of Defense conclusive upon persons adversely affected without affording them an opportunity for a hearing or judicial review. The section thereby violates the "rudimentary requirements of fair play" that persons may not be deprived of liberty or property by administrative action without according them an opportunity to be heard and present evidence in opposition. The requirement of a hearing is of peculiar importance here because the factual accuracy of the Secretary's determination is prerequisite to the constitutional application of section 5(a)(1)(D) and because of the vagueness of the statutory standard.

The Act cannot be interpreted as providing for review of the Secretary's determination in criminal prosecutions for violating section 5(a)(1)(D). Nor would such an interpretation save section 5 since persons may not be required to undergo criminal prosecution as the price of securing a hearing on the validity of the Secretary's determination.

IV.

Section 5(a)(1)(D) cannot constitutionally be applied to appellee unless the Communist Party is a Communist-action organization. Under the Act's definitions, an organization cannot be a Communist-action organization unless there exists a world Communist movement as described in section 2. It is a matter of judicial notice that the section 2 findings that there exists a monolithic world Communist movement, dominated, disciplined and controlled by the Soviet Union, are anachronistic. Yet the Act affords

appellee no means for securing a Board determination that there is no present factual predicate for the registration order. It is therefore incumbent on the Court, in the words of *Communist Party v. S.A.C.B.* "to say that the 'world Communist movement,' as Congress meant the term in 1950 . . . no longer exists." If, however, the section 2 findings may not be disturbed, even if untrue, then section 5(a)(1)(D) violates procedural due process and is a bill of attainder.

ARGUMENT

I.

Section 5(a)(1)(D), as written and applied, violates substantive due process and the First Amendment. It is not susceptible of the construction given it by the court below.

Section 5(a)(1)(D), as written, prohibits the employment in a defense facility of any person (a) who is a member of a Communist-action organization which is subject to a final order requiring it to register as such, and (b) who has "knowledge or notice" of the order. The second requirement is satisfied by publication in the Federal Register of the fact that the order has become final. Sec. 13(k). The section therefore makes it a crime for an individual to engage in defense facility employment solely because of his membership in a proscribed organization.[9]

It is irrelevant under section 5(a)(1)(D), as written and applied in the indictment (R. 1), that the member does not know or believe that the organization has an unlawful purpose or any of the characteristics of a Communist-action organization as defined in the Act and found by the Board. It is likewise irrelevant that the member is a loyal Amer-

[9] Section 5(b) provides that the conspicuous posting in a defense facility of its designation as such "shall be sufficient to give notice of such designation to any person subject thereto."

ican who has never committed and does not intend to commit an unlawful or subversive act of any kind. Indeed, the section applies to a member who has engaged in no organizational activity whatsoever. It also applies to a member like appellee who, as the District Court found (*supra*, p. 6), has a long history of satisfactory employment in the very job which the Secretary's designation now makes it a crime for him to hold.

Moreover, section 5(a)(1)(D) forbids a member from holding any kind of job in a defense facility, whether or not it is security-sensitive. Thus the indictment does not allege the nature of appellee's employment at the Todd shipyard, nor need it do so. For once the Secretary makes a designation under sections 3(7) and 5(b), it becomes unlawful for a member of a proscribed organization to hold *any* job in the designated facility, including one that is obviously non-sensitive.

Section 5(a)(1)(D) in effect establishes a presumption that all members of a proscribed organization, simply because of their membership, will be likely to engage in espionage, sabotage or other unlawful activity endangering the national security whenever they are given access to an establishment which has been designated as a defense facility. This presumption is an extreme example of the imputation of guilt from assocation.

Moreover, the presumption is conclusive. The member is not permitted to rebut it by establishing that, notwithstanding his membership, he is a loyal, law-abiding citizen and that his job, by its nature, does not lend itself to acts endangering the national security, even assuming an inclination on his part to commit them.

The restriction on employment which this irrebuttable presumption imposes on members of a Communist-action organization is substantial. The Secretary of Defense has already designated some 3000 establishments as defense facilities (Govt. Br. 28). Moreover, the absolute discre-

tion of the Secretary to make designations (see *infra*, pp. 55 - 57) and the vagueness of the statutory standard[10] empower him to designate almost any place of employment as a defense facility and thereby drastically to curtail the jobs which members of a proscribed organization may hold.

In what follows, we show that section 5(a)(1)(D), as written and as applied in the indictment, "infringes unnecessarily on protected freedoms" (*Aptheker v. Russell*, 384 U.S. 11, 19) and therefore violates substantive due process and the First Amendment. We then show that the section is not susceptible of the construction given it by the District Court (R. 9) and, hence, that it cannot be saved by interpretation.

A. Substantive due process.

Legislation disqualifying defined classes of persons from particular types of employment is subject to due process limitations. "[T]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment." *Greene v. McElroy*, 360 U.S. 474, 492, and cases there cited. And see *Wieman v. Updegraff*, 344 U.S. 183, 191-92.

Section 5(a)(1)(D) must therefore satisfy the due process requirement that a deprivation of liberty or property "shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." *Nebbia v.*

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[10] Section 5(b) authorizes the Secretary to designate as a defense facility any place of employment "with respect to the operation of which he finds and determines that the security of the United States requires the application of subsection (a) of this section."

New York, 291 U.S. 502, 525; *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-39.

The "object sought to be obtained" by section 5(a)(1)(D) is to protect the national security against the supposed dangers which Congress found that the world Communist movement presents to our national security. *Aptheker v. Secretary of State*, *supra*, at 505, 509. As *Aptheker* and other decisions of the Court establish, however, the section violates due process even on the assumption that the Congressional findings are accurate. Moreover, as experience and the 1953 findings of the Board in the Communist Party registration proceeding demonstrate, there is no real danger of the sort that section 5(a)(1)(D) purports to avert.

1. The invalidity of section 5(a)(1)(D) is established by *Aptheker v. Secretary of State*.

Aptheker invalidated section 6 of the Act, which made it a crime for a member of a Communist-action organization, simply because of his membership, to apply for or use a passport. The Court held, at 505, that the section "too broadly and indiscriminately restricts the right to travel and thereby abridges the liberty guaranteed by the Fifth Amendment." The reasons stated by the Court for this conclusion demonstrate that that case is controlling here.

(a) Section 6, like section 5, applied to all members of a Communist-action organization having knowledge or notice of the issuance of a final registration order against the organization. Thus, as *Aptheker* found (at 509-10), the section was applicable "whether or not the member actually knows or believes that he is associated with what is deemed to be a 'Communist-action' or a 'Communist-front' organization," and "whether or not one knows or believes that he is associated with an organization operating to further the aims of the world Communist movement." Accordingly, the Court concluded (at 510) that

section 6 "sweeps within its prohibition both knowing and unknowing members." Section 5(a)(1)(D), as we have seen, has the same vice.

(b) Section 5, like section 6, "also renders irrelevant the member's degree of activity in the organization and his commitment to its purpose" (*Aptheker*, at 510). It therefore precludes consideration of factors that, to paraphrase *Aptheker* (*ibid.*), "bear on the likelihood" that defense facility employment "by such a person would be attended by the type of activity which Congress sought to control." Section 5, like section 6, thus "establishes an irrebuttable presumption," which is contrary to experience, "that individuals who are members of the specified organizations will," if given an opportunity, "engage in activities inimical to the security of the United States" (*Aptheker* at 511).

(c) *Aptheker* found (at 511-12) that section 6 excluded consideration of two relevant factors, "the purposes for which an individual wishes to travel," and the "security-sensitivity of the areas in which he wishes to travel." Section 5(a)(1)(D) excludes analogous considerations. It applies to jobs which are not security sensitive (see *supra*, p. 14), and to individuals who seek only to earn a living and who, as the government acknowledges (Br. 38), "would never consider committing either sabotage or espionage."

(d) In concluding that section 6 violate substantive due process, *Aptheker* held it an important consideration (at 512-13) "that Congress has within its power 'less drastic' means of achieving the congressional objective of safeguarding our national security." The Court found examples of these "less drastic" means (at 513-14) in the Federal Employee Loyalty Program and in passport legislation proposed by President Eisenhower, both of which made membership in a Communist organization only one factor to be weighed in determining the qualification of an individual. Two additional examples are relevant to the

question of industrial security with which section 5(a)(1)(D) is concerned.

One of these is the Industrial Security Program administered by the Department of Defense under Executive Order 10865 of February 20, 1960, 3 C.F.R. 398.[11] The regulations establishing the program are contained in 32 C.F.R., Subchapter D, Part 155. They are "less drastic" than section 5(a)(1)(D) in two respects. First, they do not bar persons who lack security clearance from employment with firms having defense contracts but only from access to classified information. This limitation reflects the common sense view of *Cole v. Young*, 351 U.S. 536, 546-47, that there is no danger from the employment of security risks in non-sensitive jobs. Second, the regulations make membership in a Communist organization only one consideration "which may, in the light of all the surrounding circumstances, be the basis for denying or revoking an access authorization." 32 C.F.R. 155.3-3.

Another example of "less drastic" means is provided by the bill "to coordinate the administration of Federal personnel loyalty and security programs" proposed in the 1957 Report of the Commission on Government Security pursuant to P.L. 304, 84th Cong., pp. 691-727. Section 71 of the proposed bill adopts the approach of denying disqualified individuals access to classified information, but not all employment, in defense facilities. This follows the finding of the Report (p. 273) that exclusion from employment in non-sensitive jobs is "objectionable and unnecessary." Section 71 further provides that in determining whether an individual should receive security clearance, consideration should be given to his membership in any group which has been found by a federal agency "to have been organized or utilized for the purpose of advancing

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[11] This program replaced earlier post-war industrial security programs along similar lines described in *Greene v. McElroy*, 360 U.S. 474.

the aims and objectives of the Communist movement." Section 71 provides, however, that in determining the significance to be given to such membership by an individual, "consideration must be given" to his "actual knowledge" of the purpose of the organization, his own purpose in becoming a member, and the degree of his participation in the activities of the organization.

Aptheker (at 513, n. 12) also found significance in the views of the Department of Justice, expressed to Congress in 1950, opposing proposed legislation which predicated a conclusive presumption of unfitness for federal employment on the fact of organizational membership alone. Similarly, President Truman opposed the enactment of section 5 of the Act as unwise and unnecessary both in a message to Congress before its enactment (H. R. Doc. No. 679, 81st Cong., 2d Sess., pp. 3-4) and in his veto message (H. R. Doc. No. 708, 81st Cong., 2d Sess., pp. 6, 7). While Congress rejected these views when it passed the Act, their importance resides, as stated in *Aptheker* (at 514), in the fact that "they demonstrate the conviction of the Executive Branch that our national security can be adequately protected by means which, when compared with § 6 [and § 5], are discriminately tailored to the constitutional liberties of individuals."

Aptheker concluded (at 514) that the considerations reviewed above "compel the conclusion that § 6 of the Control Act is unconstitutional on its face" because it "sweeps too widely and too indiscriminately across the liberties guaranteed by the Fifth Amendment." Like considerations compel the same conclusion with respect to section 5(a)(1)(D).

The government (Br. 46-47) suggests four grounds for distinguishing the present case from *Aptheker*. There is no substance to any of them.

(a) It is said (Govt. Br. 46) that section 6 "applied to members of 'Communist-front' and 'Communist-infiltrated' organizations as well as to members of 'Commu-

nist-action groups'."[12] But *Aptheker* invalidated section 6 as applied to members of what the Board found to be a Communist-action group and (at 515) to "top ranking leaders" at that.

(b) It is said (Govt. Br. 46-47) that section 6 "infringed upon a more basic freedom—the right to travel" than does section 5(a)(1)(D). But the right to work, which section 5 infringes, is an equally "basic freedom" protected by the Fifth Amendment. See *supra*, p. 15. [13]

(c) The government argues (Br. 47) that section 6 of the Act, unlike section 5, "imposed an absolute prohibition in a situation where a 'less drastic' remedy could have achieved the same purpose." But, as we have shown (*supra*, pp. 17-19), a similar remedy was available for the protection of defense facilities. The government urges, however (Br. 34), that a statute providing for the security-clearance of employees of defense facilities is administratively infeasible because it "would cast a staggering burden on the Department of Defense with respect to all present employees."

The government does not, and cannot, document this assertion. It appears from its brief (p. 18) that by 1956 the Department of Defense had screened 3,000,000 employees of defense contractors, and the number is undoubtedly much greater today. The government does not tell us the number of employees in the defense facilities which have so far been designated but only (Br. 28) that the 3000 plants comprised in the designations represent less than one per cent of the nation-wide total. Obviously, screening the employees of these plants presents

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[12] The government is in error in stating that section 6 applied to members of Communist-infiltrated organizations. See *supra*, p. 2, n. 1.

[13] The government's brief in *Aptheker* (p. 54) characterized the denial of passports as "a considerably milder disability than loss of employment."

no "staggering burden," particularly since many, if not most of them, have already been screened under the existing Industrial Security Program.

The government further argues (Br. 39-40) that Congress could rationally conclude that a screening program would not "immediately protect the interest for which the statute was designed." But as President Truman warned in his veto message, *supra*, (p. 7):

> "It is claimed that this bill would prohibit the employment of Communists in defense plants. The fact is that it would be years before this bill would have any effect of this nature – if it every [sic] would."

It is now sixteen years since that warning was given, and section 5(a)(1)(D) is still in litigation. Certainly, if Congress was concerned with immediacy, it could have chosen no more effective device than section 5(a)(1)(D) to frustrate that objective.

(d) Finally, the government urges (Br. 46) that *Aptheker* is distinguishable because foreign travel "involved a much lesser risk to national security than does access to defense facilities." This down-grading of the alleged danger from travel abroad by American Communists contradicts the representations made by the government in its brief in *Aptheker*, long sections of which (pp. 25-45, 81-87) were devoted to a lurid account of the menace which such travel represents. The account in the present brief (pp. 15-26) of the supposed danger of espionage and sabotage by Communist employees of defense facilities is shorter and not so lurid, but it is no more convincing.

The major world powers doubtless spy on each other. But we are aware of no case in which an American Communist employed in a defense facility has been charged, let alone convicted, of espionage. The government cites only one instance of supposed espionage, and evidently knows of no other deemed relevant. The instance

referred to (Govt. Br. 23-24) is taken from hearings and a report of the House Committee on Un-American Activities concerning "the Communist espionage apparatus at work in the radiation laboratory of the University of California at Berkeley, where work had been done on the atomic bomb." The existence of this "apparatus" was testified to by one Paul Crouch, a renegade Communist turned professional anti-Communist witness. Hearings before Committee on Un-American Activities, H. R. 81st Cong., 1st Sess., May 6, 1949, pp. 201-02. Crouch testified for the government in the Communist Party registration proceeding where he told the same story which is the subject of the House Committee report. See transcript of record in *Communist Party v. S.A.C.B.*, No. 48, Oct. Term, 1955, pp. 428-30. However, the story was expunged from the record along with the rest of Crouch's testimony as a result of the Party's undenied allegations that the testimony was perjurious. See *Communist Party v. S.A.C.B.*, 351 U.S. 115, and *Communist Party v. S.A.C.B.*, 367 U.S. 1, 20-21.[14] On the government's own showing, therefore, there is not a single credited case of espionage by a Communist employee of a defense facility, either before or after the enactment of the Act.

Sabotage, by its nature, is incapable of concealment. Yet the government, which urges (Br. 31) that the imminent danger of sabotage justifies section 5(a)(1)(D) as a preventive measure, cannot point to a single act of this kind of which a Communist was even suspected. We have found only five reported prosecutions under the sabotage statutes, 18 U.S.C. 2151, 2153-56, since their enactment in 1918.[15] Two occurred in World War I and three in

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[14] Hereafter, the decision affirming the Board's registration order, reported at 367 U.S. 1, will be referred to as *Communist Party v. S.A.C.B., supra.*

[15] *United States v. DeBolt*, 253 F. 78; *Weisman v. United States*, 271 F. 944; *Schmeller v. United States*, 143 F.2d 544; *Roedel v. United States*, 145 F.2d 819; *United States v. Antonelli Fireworks Co.*, 155 F.2d 631.

World War II. None involved Communists, and none has been instituted since the 1953 amendment making the sabotage laws applicable during the national emergency proclaimed by the President. 18 U.S.C. 2157(a).

The most that the government can come up with to document the supposed danger of sabotage (Br. 23) is the stale charge of the House Committee on Un-American Activities that, prior to Hitler's invasion of the Soviet Union, Communist trade union leaders "had contributed to sabotage strikes in defense industries." But the Committee's use of the pejorative adjective does not make a strike any the less lawful. And the exclusion of all Communists from defense facility employment is obviously inappropriate to prevent radical trade union leaders from calling so-called political strikes. This was the ostensible purpose of section 9(h) of the Taft-Hartley Law and section 504 of the Landrum-Griffin Act. See *American Communications Association v. Douds*, 339 U.S. 382, and *United States v. Brown*, 381 U.S. 437.

The fact is — as the government's own showing makes plain — that the alleged danger from the employment of Communists in defense facilities rests on nothing more substantial than the exaggerated fears, generated by the Korean War, which persisted throughout the period of McCarthyism.

2. Section 5(a)(1)(D) is invalid under decisions of the Court that individual guilt or disqualification for employment may not be conclusively presumed from membership in the Communist Party.

It is an established principle of due process that individual guilt or disqualification for employment may not be conclusively presumed merely from the fact of organizational membership, including membership in the Communist Party. Under the authorities, guilt or disqualification may be established only upon a showing that membership is accompanied by the personal factors of knowledge that

the organization has an unlawful purpose, an intent to effectuate this purpose, and activity to that end. *Scales v. United States*, 367 U.S. 203; *Noto v. United States*, 367 U.S. 290; *Elfbrandt v. Russell*, 384 U.S. 11; *Adler v. Board of Education*, 342 U.S. 485; *Wieman v. Updegraff*, 344 U.S. 183. In short, the rule of *Aptheker* applies to employment.

Scales, at 224-28, sustained the membership clause of the Smith Act only by construing it to require proof that the accused had knowledge of the organization's violent objective, that he was an "active" member, and that he personally intended to help accomplish the organization's unlawful purpose.

The Court emphasized (at 229) that since the membership clause requires proof that the accused intended to bring about forcible overthrow, "the member for whom the organization is a vehicle for the advancement of legitimate aims and policies does not fall within the ban of the statute." Similarly, *Noto* stated (at 299) that the element of criminal intent which was read into the membership clause "must be judged *strictissimi juris*, for otherwise there is a danger that one in sympathy with the legitimate aims of the organization, but not specifically intending to accomplish them by violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share."

The government argues (Br. 47) that the factors of guilty knowledge, intent and activity, which the Court found essential to the constitutionality of the membership clause, are not requisite to section 5(a)(1)(D) because, unlike the membership clause, it does not directly prohibit membership in a proscribed organization. However, *Aptheker* (at 512) relied on the rule of *Scales* and *Noto* in holding the passport ban of the Act invalid. And three other decisions of the Court have applied the same rule in invalidating statutes which made membership in a Com-

munist organization a disqualification for public employment.

Elfbrandt v. Russell, supra (at 13) involved an Arizona statute which required the discharge of any state employee who "knowingly and wilfully becomes or remains a member of the Communist Party of the United States" or other organization having as a purpose the overthrow of the government of Arizona, "where the employee had knowledge of the unlawful purpose." The Court held (at 16) that the disqualification of a member "who does not subscribe to the organization's unlawful ends" was fatal to the constitutionality of the statute under the decisions in *Scales, Noto* and *Aptheker*. The Court noted (at 17) that, "Those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat, either as citizens or public employees." Accordingly, the Court concluded (at 19) that the statute "infringes unnecessarily on protected freedoms." The more so does section 5(a)(1)(D), which disqualifies a member who even lacks knowledge of any unlawful organizational purpose.

The government argues (Br. 41) that *Elfbrandt* is distinguishable "in the light of the substantially graver governmental interest involved here." But at least some jobs in a state government (e.g., in armories and other national guard establishments, in public service commissions, and as factory inspectors) offer greater opportunities for espionage and sabotage than do the many insensitive jobs in factories and utilities that have been designated as defense facilities (see Govt. Br. 58). *Elfbrandt* invalidated the Arizona statute as applied to all State employment because of its indiscriminate disqualification of members who (at 17) "surely pose no threat, either as citizens or public employees." Such members "surely pose no threat" as defense facility employees either.

Adler v. Board of Education, supra, sustained a New York statute authorizing the Board of Regents to list orga-

nizations found, after a hearing, to advocate violent overthrow of the government, and making membership in a listed organization with knowledge of its unlawful purpose prima facie evidence of disqualification for employment in the public schools. The statute, however, accorded the accused teacher a hearing at which he could rebut the prima facie case against him by evidence that he was nevertheless qualified. Thus, as the Court stated (at 492), the statute applied only to persons holding "*unexplained* membership in an organization found by the school authorities, after notice and hearing, to teach and advocate the overthrow of the government by force and violence, *and known by such persons* to have such purpose" (emphasis supplied). The Court held that the statute did not deny due process, but only because (at 495) "The presumption [of disqualification for membership with guilty knowledge] is not conclusive but arises only in a hearing where the person against whom it may arise has full opportunity to rebut it." The Court added (at 496, emphasis supplied):

> "Where, as here, the relation between the fact found and the presumption is clear and direct *and is not conclusive*, the requirements of due process are satisfied."

The government (Br. 45-46) misrepresents *Adler* by describing the New York statute as one "which makes any member of an organization advocating overthrow of the government by force or violence ineligible for employment in the public schools." This description omits all of the features of the statute which led the Court to sustain it. They are likewise the features whose absence is fatal to section 5.

Wieman v. Updegraff, supra, invalidated an Oklahoma statute requiring state employees, as a condition of employment, to swear that they were not members of any organization which had been listed as subversive by the Attorney General of the United States. The Court noted (at 189) that the disqualification in *Adler* was based on membership only when coupled with "knowledge of orga-

nizational purpose," whereas (at 190) under the Oklahoma statute, "the fact of membership alone disqualifies." It held this difference decisive, stating (at 191):

> ". . . under the Oklahoma Act, the fact of association alone determines disloyalty and disqualification; it matters not whether association existed innocently or knowingly. To thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources . . . Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power."

Section 5(a)(1)(D) must fall for the same reason.

The government's representation (Br. 30) that *Wieman* relates only to past membership is plainly untrue. The statutory oath contained discrete clauses, one disclaiming present, the other past, membership in any organization on the Attorney General's list at the time the statute was passed. 344 U.S. at 184-86. The Court drew no distinction between the two clauses, but invalidated both because of their failure to require knowledge of the organization's bad character. The case therefore squarely holds that a person may not be denied public employment merely because of present membership in an organization which has been officially condemned. And the Court has so interpreted the holding. See, e.g., *Lerner v. Casey*, 357 U.S. 468, 474, 477; *Beilan v. Board of Education*, 357 U.S. 399, 414-15 (dissenting opinion); *Barsky v. Board of Regents*, 347 U.S. 442, 473 (dissenting opinion).

Wieman also contradicts the government's thesis (Br. 39) that section 5(a)(1)(D) satisfies the requirement of scienter because knowledge of the organization's obligation to register is the equivalent of knowledge of its unlawful purpose. *Wieman* — like *Aptheker* (at 509-10) — ruled that the requisite scienter is knowledge that the oganization is in fact subversive, not merely that it has been officially found to be so. Due process does not permit the condemnation of an individual simply because he disagrees with an official verdict.

The principle of *Elfbrandt, Adler* and *Wieman* that a disqualification for employment may not be imposed solely on account of organizational membership applies in this case *a fortiori*. Those decisions involved public employment, in which the government has a proprietary as well as a security interest. And the statutes that were there involved merely made individuals ineligible for employment. Section 5 goes further by imposing criminal penalties on members of organizations for holding private employment.

The government (Br. 45-46) cites *Gerende v. Board of Supervisors*, 341 U.S. 56; *Garner v. Board of Public Works*, 341 U.S. 716; *Beilan v. Board of Public Education*, 357 U.S. 399; *Lerner v. Casey*, 357 U.S. 468; *Konigsberg v. State Bar*, 366 U.S. 36; and *In re Anastaplo*, 366 U.S. 82, for the proposition that the Court has "upheld State laws imposing far more severe restrictions upon members of the Communist Party" than those contained in section 5(a)(1)(D). None of these decisions gives the slightest support to this description.

Gerende is cited (Br. 45) as upholding a Maryland requirement that every candidate for public office swear that he is not engaged in an attempt to overthrow the government by violence. To the contrary, this portion of the oath, which concerned the candidate's personal innocence of crime, was not attacked in *Gerende*. And it, of course, has no resemblance to the disqualification of section 5(a)(1)(D), which is imposed without regard to personal innocence. The portion of the oath which was at issue in *Gerende* disclaimed membership in an organization engaged in an attempt at violent overthrow. The Court sustained it only because Maryland construed it to relate to membership with *knowledge* of the organization's criminal activity. The sanction of section 5(a)(1)(D), in contrast, is imposed on persons who have no knowledge that the Communist Party is in fact a Communist-action organization as the Board found it to be, let alone that it is, or even has been found to be, engaged in criminal activity.

Garner involved two separate and distinct questions. One concerned the validity of an oath requiring public employees to disclaim membership in organizations which advocate violent overthrow. As in *Gerende, supra,* the Court sustained the oath (at 723-24) by construing it to apply only to membership with knowledge that the organization in fact engages in the proscribed advocacy. The government misrepresents this portion of the decision (Br. 39) by omitting the knowledge requirement that the Court read into the oath. Moreover, the holding that the oath, as so construed, was valid has been overruled, *sub silentio,* by *Elfbrandt v. Russell, supra.*

The second question decided by *Garner* was that membership of a person in the Communist Party is relevant to his qualifications for public employment, and hence that he may constitutionally be required to disclose his membership. The Court stated, however (at 720), "Not before us is the question whether the city may determine that an employee's disclosure of such political affiliation justifies his discharge." Accordingly, nothing in *Garner* supports the government's contention that a person may be disqualified from public employment solely because of his membership in the Communist Party.

Beilan v. Board of Public Education, Lerner v. Casey, Konigsberg v. State Bar, and *In re Anastaplo,* all *supra,* simply reiterate the ruling of *Garner* that public employees and applicants for admission to the bar may be required to disclose membership in the Communist Party. Not at issue was whether such membership, standing alone, was disqualifying. Thus *Lerner v. Casey* states (at 474-75):

> "Finally, the claim that the statute offends due process because dismissal of an employee may be based on mere present membership in the Communist Party, without regard to the character of such membership, cf. *Wieman v. Updegraff,* 344 U.S. 183, must also fail. Apart from the fact that the statute simply makes membership in an organization found

> to be subversive one of the elements which may enter into the ultimate determination as to 'doubtful trust and reliability,' appellant * * * was not discharged on grounds that he was a party member."

The government's reliance (Br. 38-39) on *Harisiades v. Shaughnessy*, 342 U.S. 580; *Galvan v. Press*, 347 U.S. 522, and *Carlson v. Landon*, 342 U.S. 524, is likewise misplaced. These decisions, themselves dubious, rested on the broad power of Congress over the admission and deportation of aliens, uninhibited by requirements of substantive due process. See *Harisiades* at 597 (concurring opinion); *Galvan* at 530-32. Moreover, the authority of *Carlson*, which sustained preventive detention of alien Communists awaiting deportation, has been impaired by *United States v. Witkovich*, 353 U.S. 194.

The government (Br. 44-45) also relies on *American Communications Association v. Douds*, 339 U.S. 382, an authority of doubtful validity in light of *United States v. Brown*, 381 U.S. 437. Moreover, as pointed out in *Aptheker* (at 512, n. 11), the case is distinguishable since section 9(h) of the Taft-Hartley Law, unlike section 5(a)(1)(D), "did not affect basic individual rights to work." [16]

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[16] The government (Br. 16, 34) makes several references to section 9A of the Hatch Act (5 U.S.C. 118p(2)) disqualifying persons from federal employment for membership in an organization "that advocates the overthrow of our constitutional form of government, knowing that such organization so advocates." The government cites the statute as though its mere presence on the books somehow bolsters the constitutionality of section 5(a)(1)(D). But this statute, which has never been tested, is obviously unconstitutional under *Elfbrandt v. Russell*, *supra*, and — since the advocacy of the organization need not include violence — under *Baggett v. Bullitt*, 377 U.S. 360, 370, as well. Moreover, the statute, unlike section 5(a)(1)(D), makes knowledge of the purposes of the organization prerequisite to the disqualification.

3. The Congressional findings on which section 5(a)(1)(D) is based are negated by the findings of the Board in the Communist Party registration proceeding.

The Congressional justification for section 5(a)(1)(D) is stated in the findings of section 2(1) and (11) that it is the purpose of the world Communist movement to establish "Communist totalitarian dictatorships" by means, among other things, of espionage and sabotage, and that "agents of communism have devised clever and ruthless espionage and sabotage tactics."

As we have already seen, however (*supra*, pp. 21-23), there was no evidence before Congress of espionage or sabotage by Communist Party members in defense facilities. Moreover, although the Report of the Board in the Communist Party registration proceeding found that the Party "operates primarily to advance the objectives of such world [Communist] movement,"[17] it found no acts of or plans to commit espionage or sabotage by the Party or its members. Thus, the findings of section 2 with reference to espionage and sabotage have no basis in fact with respect to the Communist Party.

The Report of the Board likewise contradicts the finding of section 2(15) that "the Communist organization in the United States * * * and the nature and control of the world Communist movement" present a danger to the national security. The ultimate objective of establishing a Communist regime in this country, which section 2(1) attributes to the world Communist movement, is not of itself a "danger" against which Congress may constitutionally legislate. For however repugnant a "Communist totalitarian dictatorship" as defined by the Act may be, it is not an evil which Congress has power to prevent so long as the means employed to achieve it are peaceable. "If in the long run, the beliefs expressed in proletarian

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[17] Transcript of record in *Communist Party v. S.A.C.B.*, No. 537, Oct. Term, 1959, p. 2644.

dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way." Holmes, J., dissenting in *Gitlow v. New York*, 268 U.S. 652, 673.

Hence the constitutional justification for section 5(a)(1)(D) must rest on the findings of section 2 that Communist-action organizations of various countries attempt to secure their ultimate objective by forcible or other unlawful means. As the Report of the Board demonstrates, however, there is no factual basis for this finding in the activities of the Communist Party.

The Report (*id.*) found that it is the objective of the Communist Party "to install a Soviet style dictatorship in the United States." But there is no finding that the Party has ever used unlawful means to attain this objective. Nor was it found that the Party incites force or violence. At most, the Report (p. 2635) found Party advocacy of forcible overthrow as a matter of abstract doctrine, and the Court so viewed the findings. *Communist Party v. S.A.C.B.*, *supra*, at 56 (majority opinion) and 130-33 (dissent of the Chief Justice).

Advocacy of forcible overthrow as a matter of doctrine without incitement to action, is constitutionally protected and may not be punished. *Yates v. United States*, 354 U.S. 298; *Noto v. United States*, 367 U.S. 290. Accordingly, the Board findings are as bare of unlawful advocacy as they are of unlawful acts. The fact is that the Communist Party was found to be a Communist-action organization on no more substantial grounds than that, in the words of the Court of Appeals, it has an "intellectual affiliation to a cause," the cause of Communism. *Communist Party v. S.A.C.B.*, 277 F.2d 78, 83.

There is thus no foundation in fact for the government's contention (Br. 55) that a member of the Communist Party who is notified of the order that it register, "has knowledge

— or is grossly negligent in failing to have knowledge — of its unlawful purposes."

The majority in *Communist Party v. S.A.C.B.*, 367 U.S. 1, held (at 56) that a Board finding that the Party was engaged in unlawful acts or advocacy was not a prerequisite to an order that it register under the Act. (But see the dissent of the Chief Justice, at 130-33.) This holding was based on the view that insofar as the registration requirement is concerned, the Act "is a regulatory, not a prohibitory statute." However that may be with respect to the disclosure provisions of the Act, it is plainly not true of section 5(a)(1)(D), as implemented by the criminal penalties of section 15.

Because section 5(a)(1)(D) is a "prohibitory statute," its application to members of an organization found to be a Communist-action organization must be conditional upon Board findings which match the findings of section 2 that the organization has engaged in, conspired to commit, or incited unlawful conduct. Since the Board made no such findings concerning the Communist Party, section 5(a)(1)(D) may not constitutionally be applied to Party members.

B. *The First Amendment*

Section 5(a)(1)(D) excludes individuals from large areas of private employment solely because they are members of a minority political party which urges radical changes in our society. Such political discrimination is fundamentally at war with the First Amendment, which safeguards "the cherished freedom of association" from governmental infringement. *Elfbrandt v. Russell, supra*, at 18.

If infringement is permissible at all, it must have a compelling justification. This is true although the legislation is in the form of a disqualification rather than an outright prohibition. "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial or placing of conditions on a benefit or privilege." *Sherbert v. Verner*, 374 U.S. 398, 404.

The government defends section 5(a)(1)(D) on the ground that Congress was justified in finding that some members of the Communist Party will commit espionage and sabotage in defense facilities if given the opportunity to do so. We have shown that this finding is groundless. But even if it were not, section 5(a)(1)(D) would be invalid under the familiar principle that a statute touching First Amendment rights "must be 'narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the state'." *Elfbrandt v. Russell, supra,* at 18. Obviously, no such danger is presented by the employment in defense facilities of those members of the Communist Party who, as the government acknowledges (Br. 38), "would never consider committing either sabotage or espionage."

The government argues (Br. 40) that the blunderbuss scheme of section 5(a)(1)(D) is preferable to a narrowly drawn screening program because an absolute prohibition on defense plant employment, enforcible by criminal sanctions, "has an immediate *in terrorem* effect, and it requires no bulky administrative machinery to carry it into practice." But these considerations of convenience and efficiency which might be persuasive in other areas must yield to the social interest in the freedoms that the First Amendment guarantees. *N.A.A.C.P. v. Button,* 371 U.S. 415, 433, 438; *Shelton v. Tucker,* 364 U.S. 479, 488-89.

Thus, legislation punishing a bookseller for the bare possession of an obscene book cannot be sustained on the ground that a narrowly drawn statute requiring proof of scienter would be susceptible of easy evasion. *Smith v. California,* 361 U.S. 147. The state may not "burn the house to roast the pig" by proscribing the sale to anybody of books that tend to corrupt the morals of children. *Butler v. Michigan,* 352 U.S. 380, 383. It may not prohibit the distribution of anonymous leaflets the better to control false advertising and libel. *Talley v. California,* 362 U.S. 60. Nor may it bar the solicitation and subsidization of

litigation when engaged in as a form of political expression, although the same acts, in other contexts, may be prohibited as barratry. *N.A.A.C.P. v. Button, supra.*

Applying this principle, *De Jonge v. Oregon*, 299 U.S. 353, held that the assumption that the Communist Party advocates forcible overthrow, even if true, cannot justify a statute proscribing participation in its meetings for peaceable political action. Similarly, *Scales v. United States, supra,* sustained the membership clause of the Smith Act only because the Court believed that, as construed, the statute prohibited association with the Communist Party only when engaged in for the purpose of bringing about forcible overthrow. The Court stated (at 229):

> ". . . the membership clause, as here construed does not cut deeper into the freedom of association than is necessary to deal with 'the substantive evil that Congress has a right to prevent.' *Schenck v. United States*, 249 U.S. 47, 52. The clause does not make criminal all association with an organization which has been shown to engage in illegal advocacy. There must be clear proof that a defendant 'specifically intend[s] to accomplish [the aims of the organization] by resort to violence.' *Noto v. United States*, post, p. 290. Thus the member for whom the organization is a vehicle for the advancement of legitimate aims and policies does not fall within the ban of the statute. . . ." (Bracketed matter in the original.)

Section 5 runs afoul of these decisions. It restrains the association of all members, irrespective of guilty knowledge, intent or organizational activity. Accordingly, "the member for whom the organization is a vehicle for the advancement of legitimate aims and policies" *does* "fall within the ban of the statute." Again, section 5 applies to members of the Communist Party notwithstanding that the latter has *not* "been shown to engage in illegal advocacy" or conduct. See *supra,* pp. 31–32 and cf. *Noto v. United States,* 367 U.S. 290. Moreover, the section bars the members from *all* jobs in defense facilities, includ-

ing those that are non-sensitive. See *supra*, p. 17. Obviously, then, it does "cut deeper into the freedom of association than is necessary to deal with 'the substantive evils that Congress has a right to prevent'."

Section 5 is patently over-broad for the additional reason that its sanctions are not confined to persons who are members of the Communist Party in any realistic sense. The section applies to all persons found to be members under the indicia prescribed by section 5 of the Communist Control Act, 50 U.S.C. 844, and *Killian v. United States*, 368 U.S. 231. These require that in deciding whether a person charged with violating section 5 is a member of the Communist Party, the jury shall consider whether the accused ever: attended any type of Party gathering; conferred with other members "in behalf of any plan or enterprise" of the organization; "advised, counseled, or in any other way imparted information, suggestions or recommendations to [its] officers or members, or to anyone else in behalf of [its] objectives"; indicated in any way "a willingness to carry out in any manner and to any degree [its] plans, designs, objectives or purposes," or "in any other way participated in [its] activities, planning, actions, objectives, or purposes." These considerations permit a jury to apply section 5(a)(1)(D) to persons whose contacts with the Communist Party are both innocent and insignificant and who do not consider themselves to be members.

The impact of section 5 on First Amendment freedoms is magnified by the fact that the standards for determining whether an organization is a Communist-action organization and whether an accused individual is a member focus on views, policies and their expression. See *Communist Party v. S.A.C.B.*, *supra*, at 58-59, and *Killian v. United States*, *supra*.

The vice of section 5(a)(1)(D) is aggravated by what the government (Br. 40) rightly calls its "*in terrorem* effect" on Communists and non-Communists alike. "These [First

Amendment] freedoms are delicate and vulnerable, as well as extremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *N.A.A.C.P. v. Button, supra,* at 433.

The "chilling effect" (*Dombrowski v. Pfister,* 380 U.S. 479, 487) of section 5(a)(1)(D) on the exercise of First Amendment rights was described by President Truman in his veto message, *supra* (p. 5):

> "And what kind of effect would these provisions have on the normal expression of political views? Obviously, if this law were on the statute books, the part of prudence would be to avoid saying anything that might be construed by someone as not deviating sufficiently from the current Communist-propaganda line. And since no one could be sure in advance what views were safe to express, the inevitable tendency would be to express no views on controversial subjects."

The underlying premise of the government's brief (pp. 14, 29, 43) is that section 5(a)(1)(D) is justified under the war power, and (at 43) that nothing turns on the fact that we are not "technically 'at war' " with the Soviet Union. This thesis is not only fallacious as a matter of law but flouts national policy. As the President only recently declared:

> "Our compelling task is this: to search for every possible area of agreement that might conceivably enlarge, no matter how slightly or how slowly, the prospect for cooperation between the United States and the Soviet Union. In the benefits of such cooperation, the whole world would share and so, I think, would both nations." Remarks at the National Reactor Testing Site for Atomic Energy Commission at Idaho Falls, Idaho, Aug. 26, 1966, p. 3.

C. The construction of section 5(a)(1)(D) by the court below.

The District Court read the elements of guilty knowledge, intent and activity into section 5(a)(1)(D) in order to save it (R. 9). We agree with the government (Br. 50-52) that, as the court below itself recognized (R. 9), this interpretation of the statute flies in the face of *Aptheker*. As was said there of section 6 (at 515-16):

> "The clarity and preciseness of the provision in question makes it impossible to narrow its indiscriminately cast and over broad scope without substantial rewriting . . . This course would not be proper, or desirable, in dealing with a section that so severely curtails personal liberty."

Of course, if the section is found to be susceptible of the interpretation given it below, the judgment dismissing the indictment must nevertheless be affirmed for failure to charge an offense.

II.

The indictment is defective because it fails to allege that the Communist Party is a Communist-action organization.

A. Section 5(a)(1)(D) is applicable only to an organization which both is, and has registered or been ordered to register as, a Communist-action organization.

The indictment alleges that a final order is in effect requiring the Communist Party to register as a Communist-action organization. It does not allege that the Communist Party is, in fact, a Communist-action organization. The government omitted the latter allegation because, as it interprets section 5(a)(1)(D), the registration order is conclusive of the character of the Communist Party in prosecutions under that section. Government's Memorandum in Opposition to Motion to Dismiss, pp. 20-22.

In what follows, we show that the government's interpretation is erroneous in light of the text of the statute and constitutional considerations. Properly construed, section 5(a)(1)(D) makes it an element of the offense that the Communist Party *is* a Communist-action organization. The failure to allege that fact is therefore fatal to the indictment. *Russell v. United States*, 369 U.S. 749, and authorities there cited at 764-766; Rule 7(c), Federal Rules of Criminal Procedure. [18]

1. The text of the section.

Section 5 provides that "[w]hen *a Communist organization*, as defined in paragraph (5) of section 3 of this title,[19] is registered or there is in effect a final order of the Board requiring *such* organization to register," it becomes unlawful for the members of the organization to engage in specified conduct. Section 5(a)(1)(D) provides that "if *such* organization[20] *is* a Communist-action organization," it shall be unlawful for the members to hold jobs in defense facilities. It is apparent from the quoted text that a person can be guilty of violating section 5(a)(1)(D) only if two conditions are satisfied with respect to the organization of which he is a member. The organization (1) must be a Communist-action organization as defined in section 3(3), and (2) must have registered or have been ordered to register.

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[18] The District Court did not rely on this ground for dismissing the indictment. Since, however, the issue turns on the interpretation of the statute on which the indictment was founded, it is open for consideration on this appeal. *United States v. Wiesenfeld Warehouse Co.*, 376 U.S. 86, 92.

[19] Section 3(5) defines Communist organizations to include Communist-action and Communist-front organizations, thus incorporating by reference the section 3(3) and 3(4) definitions of these organizations.

[20] I.e., a Communist organization which has registered or is required by a final order to register.

Had Congress intended to make a final order requiring an organization to register as a Communist-action organization conclusive of its character for the purposes of section 5(a)(1)(D), it could easily have said so. Instead, Congress predicated criminal liability of a member not only on what the organization is found by the Board to be, but on what it "is," and thereby made the existence of the fact as well as of the finding an element of the offense.

An examination of criminal provisions of the Act shows that this result was deliberate. The only other provision imposing a disqualification for membership in Communist organizations is similarly worded, while others predicate criminal liability solely upon the fact that the organization has registered or has been finally ordered to do so.

Thus section 6(a) provides that, "[w]hen *a Communist organization* as defined in paragraph (5) of section 3 of this title is registered, or there is in effect a final order of the Board requiring *such* organization to register," it shall be unlawful for members of the organization to apply for or use passports. The quoted words are identical with the introductory words of section 5 and, like the latter, make proof that the organization is in fact a Communist organization prerequisite to the conviction of a member.

Section 6(b), however, is worded differently. It provides that "[w]hen *an organization* is registered, or there is in effect a final order of the Board requiring *an organization* to register, as a Communist-action organization," it shall be unlawful for a federal employee to issue a passport to a person whom he knows or believes to be a member. Thus, section 6(b), unlike 6(a) and 5(a)(1)(D), dispenses with proof of the actual character of the organization, and makes proof of the fact of its registration or the issuance of a final registration order sufficient. This is likewise the case with section 10, which punishes violation of the labelling requirements of the Act.[21] Again,

[21] The civil sanctions of section 11 (denial of tax deductions and exemptions) are similarly worded.

section 15(a), punishing the failure to register in obedience to a registration order, does not require proof of the character of the organization but only that it has been ordered to register.

It is apparent from the comparative wording of sections 5(a), 5(a)(1)(D) and 6(a), on the one hand, and sections 6(b), 10 and 15(a), on the other, that Congress was aware of the difference between requiring proof of the fact that an organization is of a specified character and proof of the fact that it has been found by an administrative agency to be of such character. Congress made the existence of both facts elements of the offense under section 5(a)(1)(D).[22] This conclusion, which follows from the text of the Act, is buttressed by the principle that criminal statutes are to be strictly construed. Cf. *Yates v. United States*, 354 U.S. 298, 310-11.

2. Constitutional considerations.

"The principle is old and deeply imbedded in our jurisprudence that this Court will construe a statute in a manner that requires decision of serious constitutional questions only if the statutory language leaves no reasonable

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[22] Nothing in the legislative history illuminates Congress' reasons for doing so. The introductory clauses of sections 5(a) and 6(a), as they appear in the Act, were contained in the bill passed by the House. H.R. 9490, 81st Cong., 2d Sess. The House bill did not include any provision corresponding to section 6(b). The Senate adopted an amended version of the House bill in which the introductory clauses of sections 5(a) and 6(a) were identical with the introductory clause of section 6(b) as it appears in the Act. The Senate bill included section 6(b) in its present form. The conference report adopted without comment the House version of the introductory clauses of sections 5(a) and 6(a) and the Senate addition of section 6(b). It added section 5(a)(1)(D) which did not appear in either bill. H. Rep. No. 3112, 81st Cong., 2d Sess. (on H.R. 9490). The House and Senate Committee reports add nothing further. H. Rep. No. 2980, 81st Cong., 2d Sess. (on H.R. 9490); S. Rep. No. 1358, 81st Cong., 2d Sess. (on S. 2311).

alternative. . . . Judicial abstention is especially wholesome where we are considering a penal statute." *United States v. Five Gambling Devices*, 346 U.S. 441, 448-49. Accordingly, the Court has not infrequently strained the words of a statute in order to avoid a serious constitutional doubt. *United States v. Rumely*, 345 U.S. 41, 47.

. . . Here, the government's interpretation of section 5(a)(1)(D) raises serious constitutional questions. But these may be avoided simply by adhering to the plain text of the statute.

a. Procedural due process

The only constitutional justification that the government can advance (Br. 35-36) for subjecting members of the Communist Party to the sanctions of section 5(a)(1)(D) is that the organization has the characteristics of a Communist-action organization as defined in the Act. Nevertheless, as the government interprets the section and has drafted the indictment, the character of the Party is not litigable in the prosecution of appellee for violating the section. Instead, he is concluded on this issue by the order of the Board requiring the Party to register as a Communist-action organization.

Appellee was not a party to the proceeding in which this order was entered.[23] And the Act provides no procedure permitting appellee to challenge the Board's finding that the Party is a Communist-action organization unless he may do so in his prosecution for violating section 5. The government's interpretation of the section therefore denies appellee procedural due process since it subjects him to deprivation of liberty without according him a hearing at which he may contest the factual premise on which the validity of the deprivation depends. *United*

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[23] In accordance with section 13(a) of the Act, the proceeding was brought against the Communist Party alone. See *Communist Party v. S.A.C.B.*, *supra*, at 19.

States v. Carolene Products Co., 304 U.S. 144, 152; *Noto v. United States*, 367 U.S. 290, 299; *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 161-174, 175-179 (concurring opinions); *Renaud v. Abbott*, 116 U.S. 277, 288. Cf. *Kirby v. United States*, 174 U.S. 47.

The due process defect inherent in the government's interpretation of section 5 is aggravated by the fact that the Board's determination that the Communist Party is a Communist-action organization was made in 1953,[24] ten years before the indictment of appellee. In this changing world, a conclusive presumption that a state of facts, once found to exist, will continue in perpetuity is plainly arbitrary. It is therefore a principle of due process that "the constitutionality of a statute predicated on the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." *United States v. Carolene Products Co., supra*, at 153; *Chastleton Corporation v. Sinclair*, 264 U.S. 543; *Baker v. Carr*, 369 U.S. 186, 214.

The rule of these decisions has peculiar pertinence to factual findings which, like the Board's, involve an evaluation of social and political ideas and phenomena. Moreover, as the Chief Justice observed in his dissent in *Communist Party v. S.A.C.B., supra*, at 134, n. 11, the Board's 1953 finding was itself based on a presumption of continuity which "is certainly dubious" as applied to "stale evidence" of Party activity prior to 1940.[25] And only recently the Court remanded a proceeding under the Act to the Board because evidence taken in 1955 was held to be too stale to support a Board finding made five years later that the organization proceeded against was a Communist-front organization. *American Committee for Protection of Foreign Born v. S.A.C.B.*, 380 U.S. 503. See

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[24] See *Communist Party v. S.A.C.B., supra*, at 19-20.

[25] The majority (at 69) declined to pass on the sufficiency of this evidence.

also, *Veterans of the Abraham Lincoln Brigade v. S.A.C.B.*, 380 U.S. 513.

Accordingly, even if it could be argued that appellee, if found by a jury to be a member of the Communist Party, will be bound by the Board's 1953 determination against the organization, due process would still entitle him to a hearing on the Party's *current* character. The government's interpretation of section 5 denies him such a hearing.

Nor can it be argued that appellee is afforded due process by section 13(b) and (i) of the Act. The section permits an organization which has registered as a Communist-action organization to apply for a cancellation of its registration and to secure relief on showing that it is no longer a Communist-action organization. This provision is plainly inadequate to protect persons subject to the deprivations of section 5, since it does not permit a member, let alone an individual like appellee who is merely suspected or accused of membership, to seek a redetermination of the organization's status.

Moreover, since proceedings under section 13(b) and (i) are open only to registered organizations, they are not available to the Communist Party. For the Party has not registered in compliance with the 1953 order of the Board but is still litigating the contentions, held premature in *Communist Party v. S.A.C.B., supra*, that it cannot constitutionally be required to do so. See *supra*, n. 5. Obviously, appellee's constitutional rights may not be infringed because the Communist Party has elected to assert its own.

b. Indictment, trial by jury, and proof beyond a reasonable doubt.

The government's defense of the constitutionality of section 5(a)(1)(D) rests on the premise that the Communist Party has the characteristics which the Act ascribes to a Communist-action organization. Yet, under the gov-

ernment's interpretation, the issue as to the character of the Party is withdrawn from the grand jury that returns the indictment and from the judge and petit jury who try it. Determination of the issue is committed to the Board, an administrative agency. The agency, moreover, bases its determination on a preponderance of the evidence and not on proof beyond a reasonable doubt.[26] So interpreted, section 5(a)(1)(D) violates the constitutional guarantees of indictment by grand jury, trial by jury, and due process. *Wong Wing v. United States*, 163 U.S. 228; *United States v. Spector*, 343 U.S. 169, 174-180 (dissenting opinion); *Aptheker v. Secretary of State, supra*, at 518 (concurring opinion of Justice Black); *Maggio v. Zeitz*, 333 U.S. 56, 78-79 (opinion of Justice Black); *United States v. England*, 347 F.2d 425; Fraenkel, Can the Administrative Process Evade the Sixth Amendment? 1 Syracuse L. Rev. 173. Cf. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144.

Wong Wing invalidated a statute for the imprisonment of Chinese aliens who were found by a United States commissioner to be in the country unlawfully. The Court held that the statute violated the Fifth and Sixth Amendments by authorizing punishment without indictment by grand jury and trial by judge and jury. It recognized that aliens could be deported on administrative determinations of their illegal presence, but it decided that they could not be punished for the same cause without observance of the constitutional safeguards governing criminal cases.

The Act differs from the statute in *Wong Wing* in that it accords appellee the constitutional safeguards with respect to one element of the offense, membership in the Communist Party. But it denies these safeguards with respect to the other major element, the character of the Party. The principle of *Wong Wing*, however, and the plain meaning of the Constitution makes the safeguards applicable to *every* element of the offense. The result in

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[26] See section 14(a) of the Act.

Wong Wing would have been the same if the statute had provided for an administrative determination of the illegality of the alien's entry and had accorded him a jury trial limited to the issue of his presence in the country.

This was virtually the situation in *United States v. Spector*, 343 U.S. 169. There the statute punished aliens under administrative deportation orders for failing to depart the country or to take steps to effect their departure. Under the statute, therefore, the issue of the deportability of the accused was determined administratively and not at the criminal trial. The majority of the Court did not consider whether this fact invalidated the statute, holding (at 172-173), that the question had not been raised and hence that decision on it should be reserved.

Justice Jackson, joined by Justice Frankfurter, in an opinion with which Justice Black expressed agreement,[27] dissented on the ground that the question was properly before the Court and that the statute unconstitutionally denied the accused a judicial and jury trial on the issue of his deportability. After reviewing the decision in *Wong Wing*, the opinion proceeds (at 177-78):

> "The subtlety of the present Act consists of severing the issue of unlawful presence for administrative determination which then becomes conclusive upon the criminal trial court . . . If Congress can subdivide a charge against an alien and avoid jury trial by submitting the vital and controversial part of it to administrative decision, it can do so in the prosecution of a citizen. And if vital elements of a

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[27] Justice Black wrote a separate opinion dissenting on other grounds, but stated (at 174, n. 1) that, "I have not seen a satisfactory reason for rejecting [Justice Jackson's] view," and cited his own separate opinion in *Maggio v. Zeitz*, *supra*, at 78-79. He there held that a finding by a referree in bankruptcy in a turn-over order that an officer of the bankrupt was in possession of its merchandise could not constitutionally substitute for proof of such possession beyond a reasonable doubt in contempt proceedings against the officer for disobedience of the order.

> crime can be established in the same manner here attempted, the way would be open to effective subversion of what we have thought to be one of the most effective constitutional safeguards of all men's freedom."

As interpreted by the government, section 5(a)(1)(D), like the self-deportation statute, subdivides the crime it creates by submitting "the vital and controversial part" — the nature of the organization — to conclusive administrative determination. If this procedure were permissible, Congress could likewise enact a statute making a determination of the Internal Revenue Service that a taxpayer had received taxable income conclusive of that fact in a prosecution for his failure to report the income in his return The government's contention that the revenue laws should be so interpreted was rejected in *United States v. England, supra,* at 438-443, in reliance on Justice Jackson's reasoning in *Spector*. The government's interpretation of section 5(a)(1)(D) must be rejected on the same ground.

The majority in *Spector* (at 172-173), in stating that it was not foreclosing subsequent consideration of the question dealt with by Justice Jackson, noted, "cf. *Yakus v. United States,* 321 U.S. 414; *Cox v. United States,* 332 U.S. 442." Neither decision is contrary to the views expressed by Justice Jackson.

Yakus sustained a wartime statute imposing criminal penalties for violations of maximum price regulations of the Office of Price Administration. The statute foreclosed defendants from challenging the regulations in criminal prosecutions by providing that the validity of the regulations could be contested only in administrative proceedings subject to judicial review.[28]

The price regulations dealt with in *Yakus* were

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[28] But see the dissenting opinion of Justice Rutledge, at 478-489.

instances of administrative rule-making — the promulgation of rules of general application for the regulation of future conduct. The decision is applicable only to the rule-making function of administrative agencies, not to administrative adjudication.

In promulgating rules or regulations, an administrative agency performs a legislative function. *Assigned Car Cases*, 274 U.S. 564, 583. Congress might itself prescribe the rule by detailed legislation. But it may choose instead to leave the details for determination by an administrative agency. Since, in the latter case, the power exercised by the agency is legislative, it is not subject to constitutional limitations on the exercise of judicial power. Accordingly, the validity of rules prescribed by the agency is not a matter for determination by the grand jury that returns an indictment for their violation or the petit jury that tries the case. Nor is their validity subject to the requirement of proof beyond a reasonable doubt.

The situation is different under the statutes involved here and in *Spector*, where the administrative agencies issued adjudicative orders determining that a specific individual or organization had engaged in proscribed conduct. This is a quasi-judicial function which Congress itself may not perform and which it may delegate to the Executive only to the extent that it does not infringe on the judicial function or the procedures prescribed by the Constitution for the determination of guilt in criminal cases. Justice Jackson pointed out this distinction in *Spector*, at 179.[29] Cf. *United States v. Brown*, 381 U.S. 437, 442-446, 449-450.

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[29] Justice Jackson, as well as Justices Frankfurter and Black who agreed with his views in *Spector*, were members of the majority that decided *Yakus*. That the latter was confined to cases of administrative rule-making appears from its emphasis (at 444) on the fact that the case involved violations of "an administrative regulation."

Cox v. United States, supra, held that a draftee accused of refusing to report for service in violation of the Selective Service Act is not entitled to a jury trial on the issue of his classification but is bound by the administrative denial of an exempt status unless the latter is invalid as a matter of law.[30]

Selective Service Act cases are *sui generis*. Congress, in the exercise of the war power, may require military service of all. An exemption is an act of grace and may be granted on such conditions as Congress chooses to exact. *Hamilton v. Regents,* 293 U.S. 245, 266-267 (concurring opinion). Congress therefore has complete discretion to authorize such classification of registrants as it sees fit. *Falbo v. United States,* 320 U.S. 549, 553-554. It is for this reason that the Court, while frequently divided on questions involving classifications and procedures under the Selective Service Act, has not treated them as having a constitutional dimension or as presenting more than an issue of statutory construction. See, e.g. *Estep v. United States,*[31] and *Falbo v. United States,* both *supra; Dickinson v. United States,* 346 U.S. 389; *United States v. Nugent,* 346 U.S. 1; *Gonzales v. United States,* 364 U.S. 59. For the same reason, the Court has approved procedural shortcuts in Selective Service Act cases that are not countenanced in other contexts. Cf. *Estep v. United States, supra,* and *Eagles v. Samuels,* 329 U.S. 304, with *Ng Fung Ho v. White,* 259 U.S. 276, and *Jacobellis v. Ohio,* 378 U.S. 184, 190; *United States v. Nugent, supra,* with *Greene v. McElroy, supra.*

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[30] I.e., because it was made in violation of the statute or regulations or lacked any basis in fact. See *Estep v. United States,* 327 U.S. 114, 122.

[31] Justices Murphy (at 125) and Rutledge (at 132) agreed with the prevailing opinion's construction of the statute but added that this was also required by constitutional considerations. None of the other six Justices who participated (three of whom wrote opinions) saw any constitutional question in the case.

The decision in *Cox* denying the accused a jury trial on the issue of his classification rested upon and was required by the prior holding in *Estep v. United States, supra,* that the defendant in a prosecution for draft evasion may attack his classification only on the ground that it is invalid as a matter of law. See *Cox,* at 452-453. As noted above, the Court saw no issue of constitutionality in *Estep.* One sentence of the majority opinion in *Cox,* however, touches upon the constitutional question by way of dictum: It states (at 453):

> "The concept of a jury passing independently upon an issue previously determined by an administrative body or reviewing the action of an administrative body is contrary to settled federal administrative practice; the constitutional right to jury trial does not include the right to have the jury pass on the validity of an administrative order."

The only authority cited for these generalizations, *Yakus v. United States, supra,* does not support them. For *Yakus* involved an administrative *regulation,* not an administrative *adjudication,* and applies, as we have seen, only to rule-making.

The self-deportation statute considered in *Spector* differs from the Selective Service Act in decisive respects. It involves none of the exigencies presented by an exercise of the war power in raising an army. It is not a matter of grace that non-citizens who are lawful residents of this country are exempt from the duty of self-deportation which the statute exacts. On the contrary, the duty may constitutionally be imposed only on non-citizens whose presence here is unlawful. Hence, an administrative finding of the facts which are prerequisite to the constitutional application of the statute cannot conclude an accused in a prosecution for its violation. It was doubtless because these distinctions appeared self-evident that Justices Jackson and Frankfurter, who voted with the majority in *Cox,* and Justice Black who agreed (at 455) that Cox was not enti-

tled to a jury trial on the issue of his classification, did not think it apposite to refer to that case in *Spector*.[32]

The present case is on all fours with *Spector*. For section 5(a)(1)(D) is unconstitutional as applied to appellee unless, at least, the Communist Party is in fact a Communist-action organization. Hence appellee may not be concluded in a criminal prosecution for violating the section by an administrative determination of this issue of constitutional fact.

c. Attainder

Communist Party v. S.A.C.B., supra, held (at 82-88) that the Act is not a bill of attainder as applied to the Communist Party. We believe that conclusion erroneous for the reasons stated in Justice Black's dissenting opinion (at 146-147). Be that as it may, section 5(a)(1)(D), as interpreted by the government, attaints the members of the organization under the reasoning of the majority in the *Communist Party* case and under *United States v. Brown, supra.*

(1) "A bill of attainder is a legislative Act which inflicts punishment without judicial trial." *Cummings v. Missouri,* 4 Wall. 277, 323. The *Communist Party* case, abstracting the registration requirement of section 7 from its setting in the Act and viewing it in isolation, held (at 56) that it "is a regulatory, not a prohibitory statute." On this view, the registration requirement is not a bill of attainder because it does not inflict punishment.

Section 5(a)(1)(D), on the other hand, imposes criminal liability on members of the Communist Party who hold

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[32] And see Justice Jackson's dissent in *Dickinson v. United States, supra,* at 400, written two years after *Spector,* in which he expressed the view that all factual questions relating to the classification of a draftee are "to be left wholly to the [draft] board" and that "its decision is final" in a prosecution for draft evasion.

employment in defense facilities. Obviously, it inflicts punishment on such members. *United States v. Brown, supra,* at 456-460.

The remaining question, therefore, is whether section 5(a)(1)(D) denies a judicial trial. As interpreted by the government, the section clearly does so. For under that interpretation, the determination on which the infliction of punishment depends — that the Communist Party is a Communist-action organization — is made by the Board and not by a court.

United States v. Brown, supra, invalidated a statute making it a crime for a member of the Communist Party to hold office in a labor organization. The Court held (at 461) that if Congress wishes to "weed dangerous persons out of the labor movement" or forbid subversives from holding sensitive employment, it "must accomplish such results by rules of general applicability. It cannot specify the people upon whom the sanction it prescribes is to be levied."

The present case would be identical with *Brown* if Congress, having determined the Communist Party to be a Communist-action organization, had identified it by name in section 5(a)(1)(D). But the prohibition against bills of attainder is likewise infringed if Congress has delegated the power to make this determination to the executive branch of the government.[33] For appellee would still be denied the *judicial* trial which is prerequisite to the infliction of punishment. Cf. *Joint Anti-Fascist Refugee*

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[33] In fact, an essential part of the determination that the Communist Party was a Communist-action organization was made by Congress itself. For the Board was bound, in the proceeding against the Party, by the Congressional findings of section 2 of the Act that there existed a world-Communist movement controlled by the Soviet Union and having other specified characteristics. *Communist Party v. S.A.C.B., supra,* at 112. See, *infra,* pp. 58-59.

Committee v. McGrath, supra, at 144 (concurring opinion).[34]

(2) *Communist Party v. S.A.C.B., supra,* at 86-87, recognized that the Act's registration requirement would impose punishment upon and therefore attaint the Communist Party if the organization could not escape the consequences of a final registration order by ceasing to engage in the conduct on which the Board predicated the order. The Court believed that a proceeding under section 13(b) afforded the Party the required escape, stating (at 87):

> "In this proceeding the Board has found, and the Court of Appeals has sustained its conclusion, that the Communist Party, by virtue of the activities in which it now engages, comes within the terms of the Act. If the Party should choose at any time to abandon these activities, *after it is once registered pursuant to § 7,* the Act provides adequate means of relief . . . §§ 13(b), (i), (j), 14(a). Far from attaching to the past and ineradicable actions of an organization, the application of the registration section is made to turn on continuously contemporaneous fact; its obligations arise only because, and endure only so long as, an organization presently conducts operations of a described character." (Emphasis supplied.)

What the Court overlooked in the quoted passage was that litigation of the Party's constitutional objections to the registration requirement, which the opinion elsewhere dismissed as premature, might be prolonged and could

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[34] Section 5(a)(1)(D) is a bill of attainder even if interpreted in accordance with its text. So interpreted, an accused receives a judicial trial with respect to the character of the organization in which he is alleged to hold membership. But he receives no trial at all with respect to those personal characteristics (knowledge, intent and activity) whose presence can alone justify his punishment. These characteristics have been imputed to him by Congress solely because of the possibly irrelevant fact of his membership. See *supra*, pp. 16-17. In this sense, it is Congress which inflicts the punishment. See *United States v. Brown, supra,* at 455-456.

eventuate in a decision that the registration order may not be enforced. Since a section 13(b) proceeding is available only to *registered* organizations, it does not provide "adequate means of relief" to the Party, at least so long as the latter's constitutional challenge remains in litigation. See, *supra*, p. 44. Nor, paradoxically, will such a proceeding ever do so if the Party is successful. It was therefore erroneous, on the Court's own premise, to conclude that sections 13(b), (i), (j) and 14(a) save the registration requirement from condemnation as a bill of attainder with respect to the Party.

Furthermore, whatever may be the case with respect to it, appellee cannot under any circumstances secure reconsideration of the Party's status if the government's interpretation of section 5(a)(1)(D) is accepted. See *supra* p. 44. That interpretation leaves him with no possible escape from the effect of the Board's 1953 determination.

Unlike the statute invalidated in *United States v. Brown*, *supra*, the Act does not identify the Communist Party, by name, as a Communist-action organization. But now that the identification has been made by the Board and affirmed, the situation of appellee is as though the Party had been named in the Act. For the sanctions of section 5(a)(1)(D) attach, not to membership in an organization having described characteristics, but to membership in a specified organization — the Communist Party — whether it currently fits the statutory description or not. Accordingly, in this respect also, section 5(a)(1)(D), as interpreted by the government, is invalid under the rule of *Brown*.

It cannot be urged that the government's interpretation of section 5(a)(1)(D) should prevail because of the impracticality of permitting relitigation of the status of the Communist Party in each prosecution under the section. It is only in "rare and unusual circumstances" that the literal meaning of a statute will be disregarded, even when it seems to lead to an absurd result. *Crooks v. Harrelson*, 282 U.S. 55, 60. There is nothing absurd about a literal

interpretation of 5(a)(1)(D). And it is no more impractical to require proof of the character of the Communist Party in each prosecution under that section than to require similar proof in each prosecution under the membership clause of the Smith Act. See *Scales v. United States*, 367 U.S. 203 and *Noto v. United States*, 267 U.S. 290. As the latter stated (at 299):

> "The kind of evidence which we found in *Scales* sufficient to support the jury's verdict of present illegal Party advocacy is lacking here in any adequately substantial degree. It need hardly be said that it is on the particular evidence in a particular record that a particular defendant must be judged, and not upon the evidence in some other record or upon what may be supposed to be the tenets of the Communist Party."

Cf. also, *Fiske v. Kansas*, 274 U.S. 380, with *Burns v. United States*, 274 U.S. 328.

B. If the government's interpretation of section 5(a)(1)(D) is accepted, the section is unconstitutional.

If the government has correctly interpreted section 5 (a)(1)(D), and if the indictment therefore charges an offense, then the section is unconstitutional for the reasons stated *supra*, pp. 42-55.

III.

Section 5(a)(1)(D) denies procedural due process because it makes designations of defense facilities by the Secretary of Defense conclusive upon persons adversely affected without affording them an opportunity for a hearing or judicial review.

Section 3(7) broadly defines "facilities" so as to include any place of employment and "any part, division or department" thereof. The authority of the Secretary of Defense to designate a facility as a defense facility is similarly broad. He is "authorized and directed" by section 5(b) to

do so upon finding that "the security of the United States requires" the application to the facility of the employment sanctions of section 5(a).

The authority of the Secretary to designate defense facilities empowers him to terminate the employment of some members of the Communist Party and to blacklist all members. Yet the Act provides no procedure permitting persons affected by his designation to contest its validity. There is no provision for an administrative hearing either before or after the designation is made, and, to appellee's knowledge, none was held in the present case. Nor is there any provision for judicial review. Instead, the action of the Secretary under section 5(b) concludes "any person subject thereto or affected thereby" simply upon the posting in the facility of notices of his designation.

The Act thereby violates the "rudimentary requirements of fair play" that persons may not be deprived of liberty or property by administrative action without according them a reasonable opportunity to be heard and present evidence in opposition. *Morgan v. United States*, 304 U.S. 1, 14-15. To the same effect: *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 161-74, 175-79 (concurring opinions); *Ewing v. Mytinger & Casselberry*, 339 U.S. 594, 598, 599; *Yakus v. United States*, 321 U.S. 414, 433, 446. Cf. *Armstrong v. Manzo*, 380 U.S. 545, 550.

Since the designation by the Secretary of a defense facility prescribes a rule of general application (i.e. to all persons who are or may become members of Communist organizations) for regulating future conduct, it is an instance of administrative rule-making and not adjudication. Accordingly, the principle of Justice Jackson's opinion in *Spector* is inapplicable. See *supra*, pp. 47-48. But the due process requirement of a hearing applies to administrative rule-making as well as adjudication. Both

the *Morgan* and *Yakus* cases, for example, involved rule-making.[35]

The Act's violation of procedural due process is the more flagrant since the factual accuracy of the Secretary's determination is constitutionally prerequisite to the application of the sanctions of section 5. Cf. *United States v. Carolene Products Co.*, 304 U.S. 144, 152. Furthermore, the requirement of a hearing assumes peculiar importance here because of the vagueness of the statutory standard and the nature of the issue confided to the Secretary's discretion. "An opportunity to be heard may not seem vital when an issue relates only to technical questions susceptible of demonstrable proof on which evidence is not likely to be overlooked and argument on the meaning of conflicting and cloudy data not apt to be helpful. But in other situations an admonition of Mr. Justice Holmes becomes relevant. 'One has to remember that when one's interest is keenly excited evidence gathers from all sides around the magnetic point . . .' It should be particularly heeded at times of agitation and anxiety, when fear and suspicion impregnate the air we breathe." *Joint Anti-Fascist Refugee Committee v. McGrath, supra*, at 170-71 (concurring opinion of Justice Frankfurter, ftn. omitted).

The Act cannot be interpreted as providing for review of the Secretary's designation in criminal prosecutions for violations of section 5(a)(1)(D). For the language and structure of the Act compel the conclusion that Congress intended the Secretary's determination to be conclusive. Moreover, such an interpretation would require the Court to write an entirely new statute, specifying such procedural matters as whether review is to be by the judge or

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[35] The incidents of a due process hearing for rule-making may differ in some respects from those required for adjudication. See Davis, The Requirement of a Trial-Type Hearing, 70 Harv. L. Rev. 193.

the jury in the criminal proceeding; who has the burden of proof; the quantum of evidence needed to satisfy it, and whether the Secretary may be required to disclose classified information on which his determination was based. Cf. *Aptheker v. Secretary of State, supra,* at 515-16.

Finally, section 5 would not be saved by such an interpretation, even if permissible. For persons deprived of their liberty and property by the Secretary's designation may not be required to undergo criminal prosecution as the price of securing a hearing on its validity. Due process requires that they be afforded a hearing before the designation takes effect. *Ewing v. Mytinger & Casselberry, supra,* at 598, and cases there cited; *Yakus v. United States, supra,* at 437-39.

IV.

Section 5(a)(1)(D), as applied, is unconstitutional because the order of the Board requiring the Communist Party to register as a Communist-action organization has been invalidated by facts susceptible of judicial notice establishing that the world Communist movement described in section 2 of the Act does not exist.

The government's defense of the constitutionality of section 5(a)(1)(D) rests on the premise that a member of an organization having the characteristics of a Communist-action organization is a security risk. Even assuming the validity of that premise, the section cannot be constitutionally applied to members of the Communist Party unless the latter is a Communist-action organization within the meaning of the Act.

Section 3(3) of the Act defines a Communist-action organization as one which is controlled by the foreign government controlling the world Communist movement referred to in section 2 and which operates to advance the objectives of such movement. Hence there cannot be a Communist-action organization unless there exists a world Communist movement as described in section 2.

Section 2 finds that there exists a world Communist movement, under the direction and control of the Communist dictatorship of an unnamed foreign country, and made up of Communist-action organizations which are national sections of a world-wide Communist organization and which are subject to the direction, control and discipline of the unnamed foreign dictatorship. The Board, in the Report accompanying its 1953 registration order against the Communist Party, found that the unnamed foreign country referred to in section 2 was the Soviet Union. See *Communist Party v. S.A.C.B., supra,* at 112.

In affirming the order of the Board, this Court said of the section 2 findings concerning the world Communist movement (*ibid.*):

> "The characteristics of the movement and the source of its control are not to be established by the Attorney General in proceedings before the Board, nor may they be disproved. But this is because they are merely defining terms whose truth, as such, is irrelevant to the issue in such proceedings. They are referrents which identify *'the* foreign government' to which § 3(3) adverts. The Board, construing the statute, concluded that that foreign government was the Soviet Union. We affirm that construction."

The Court recognized, however, that changed circumstances would require a change in this construction of section 2. It stated (at 113):

> "If, in future years, in a future world situation, the Soviet Union is no longer the foreign country to which § 2(1) and (4), fairly read in their context, refer - so that substantial domination by the Soviet Union would not bring an organization within the terms of § 3(3) - that, too, will be a matter of statutory construction which no 'findings' in the statute foreclose. The Board or a reviewing court will be able to say that the 'world Communist movement,' as Congress meant the term in 1950 (and whether or not there really existed, in 1950, a movement having all the characteristics described in § 2), no longer exists, or that Country X or Y, not the Soviet Union, now directs it."

The eventuality hypothesized by the Court when the world Communist movement as described in section 2 "no longer exists" has materialized. Whatever might have been the prevailing view concerning the findings of section 2 when Congress made them in 1950, their description of the world Communist movement is plainly anachronistic today. Statesmen and scholars alike recognize that the picture of Communism as a monolithic world movement, under iron Soviet discipline and control, and dedicated to the overthrow of all free governments by criminal and conspiratorial means, bears no resemblance to contemporary reality.

George F. Kennan has summarized the currest Western view as follows (Polycentrism and Western Policy, Foreign Affairs, Jan. 1964, p. 172):

> "Much of the discussion in Western countries today of the problem of relations with world Communism centers around the recent disintegration of that extreme concentration of power in Moscow which characterized the Communist bloc in the immediate aftermath of the Second World War, and the emergence in its place of a plurality of independent or partially independent centers of political authority within the bloc; the growth, in other words, of what has come to be described as 'polycentrism.' There is widespread recognition that this process represents a fundamental change in the nature of world Communism as a political force on the world scene; and there is an instinctive awareness throughout Western opinion that no change of this order could fail to have important connotations for Western policy."

Elsewhere in the same article, the author writes (p. 174):

> "Communism has now come to embrace so wide a spectrum of requirements and compulsions on the part of the respective parties and regimes that any determined attempt to re-impose unity on the movement would merely cause it to break violently apart at one point or another."

Senator Fulbright devoted a Senate speech entitled "Foreign Policy - Old Myths and New Realities" to the same subject (110 Cong. Rec. 6227), in the course of which he said (p. 6228):

> "The master myth of the cold war is that the Communist bloc is a monolith composed of governments which are not really governments at all but organized conspiracies, divided among themselves perhaps in certain matters of tactics, but all equally resolute and implacable in their determination to destroy the free world."

In similar vein, Vice President (then Senator) Humphrey, in an article for the North American Newspaper Alliance, has written that, "The 'monolithic unity' of the Communist bloc is an archaic myth to which no one even bothers to pay lip service any more." Washington Evening Star, Sept. 3, 1964. And Secretary of State Rusk, speaking before the IUE-AFL-CIO, declared that, "The Communist world is no longer a single flock of sheep blindly following behind one leader." Congressional Quarterly, March 6, 1964, p. 479. More recently, he said in an address to the New York Council on Foreign Relations (N.Y. Times, May 25, 1966):

> "Significant changes have occurred within the Communist world. It has long ceased to be monolithic, and evolutionary influences are visible in most of the Communist States."[36]

The political realities portrayed in these statements are matters of common knowledge and proper subjects for official or judicial notice. Yet, for the reasons examined earlier (*supra*, p. 44), the Act affords appellee no means of securing Board consideration of the fact that, in the words of *Communist Party v. S.A.C.B.*, *supra*, at 113, "'the world Communist movement,' as Congress meant the term in 1950 . . . no longer exists," and hence

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[36] Likewise, Arnold J. Toynbee has written that "the monolithic solidarity of world Communism is an exploded myth." We Must Woo Red China, Saturday Evening Post, July 17, 1965, p. 10.

that the registration order predicated on the existence of such a movement has been invalidated.

Nor would acceptance of appellee's position that section 5(a)(1)(D) requires proof in a criminal prosecution that the Communist Party is a Communist-action organization result in making the characteristics and control of the world Communist movement triable issues of fact in the criminal proceeding. For *Communist Party v. S.A.C.B.* held (at 112) that, "The characteristics of the [world Communist] movement and the source of its control are not to be established by the Attorney General . . . nor may they be disproved." Instead, the Court held (at 113) that these are questions of statutory construction. Hence they can be resolved only on the basis of judicial notice.

If this reading of *Communist Party v. S.A.C.B.* is accepted, it is incumbent on the Court "to say that the 'world Communist movement,' as Congress meant the term in 1950 . . . no longer exists" and therefore that section 5(a)(1)(D) cannot constitutionally be applied to appellee. On the other hand, if the findings of section 2 are conclusive even though patently anachronistic, then section 5(a)(1)(D), as applied, is unconstitutional on two grounds. First, it violates the due process principle that "the constitutionality of a statute predicated on the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." *United States v. Carolene Products Co.*, 304 U.S. 144, 153. Second, the Act is a bill of attainder because it does not "turn upon continuingly contemporaneous fact." *Communist Party v. S.A.C.B., supra*, at 87. See *supra*, pp. 43-44, 53-54.

CONCLUSION

The judgment below dismissing the indictment should be affirmed.

Respectfully submitted,

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APPENDIX

AMENDED MOTION TO DISMISS INDICTMENT
Filed September 3, 1963

Defendant above named hereby moves the court for an order dismissing the indictment in the above entitled case on the ground that it fails to charge an offense for the following reasons:

1. That the statute upon which said indictment is based, that is, section 5 (a) (1) (D) of the Internal Security Act of 1950, (50 U.S.C. Sec. 784 (a) (1) (D)) is void on its face as a direct abridgment of the freedoms protected from Congressional interference by the First Amendment to the Constitution of the United States;

2. That the section is void on its face as a statute which without due process of law takes away, or purports to take away, liberty and property, particularly the liberty and property embodied in the right of a person to enter into a contract for gainful employment, such denial of due process being contrary to the provisions of the Fifth Amendment;

3. That the section is void on its face in that it is impossible to ascertain from the statute what conduct, if any, could, would, or does constitute a criminal act under it, and by reason of this vagueness as to what constitute the elements of the conduct purportedly prohibited by it, the statute deprives a person charged under it of due process of law contrary to the Fifth Amendment;

4. That the section on its face, and as applied in this indictment, is void in that the alleged designation of the Communist Party of the United States of America as a "communist action organization":

(a) fails by so designating the Communist Party in administrative proceedings conducted without any notice of any kind to the defendant to afford defendant notice, hearing or opportunity to be heard, and of the right of confrontation of witnesses and cross examination with respect to an essential element of this indictment, thus depriving defendant of due process of law in violation of the Fifth Amendment; and

(b) fails to set forth or charge facts to be considered by the jury as to the nature of the Communist Party, and particularly as to whether the Communist Party is, in fact, a "communist action organization" as defined by the statute, thus depriving him of a jury trial on an essential element of the charge, in violation of the Sixth Amendment; and

(c) fails to allege or show that any reasonable relationship exists between a public or national interest which can be constitutionally protected and the means sought to be applied by this statute to protect such interest; that is, the administrative proscription of the Communist Party and the consequential proscription of defendant's freedom to contract for gainful employment as an alleged member of such political party.

5. The section on its face, and as construed and applied in this indictment, is void in that in designating Todds Shipyards Corporation, Seattle Division, Seattle, Washington, as a defense facility:

(a) the Secretary of Defense acted without any notice to defendant and thus has deprived him of due process of law contrary to the Fifth amendment; and

(b) the Secretary of Defense has designated all employment within Todds Shipyards Corporation, Seattle Division as prohibited to members of the Communist Party and thus has unreasonably and arbitrarily excluded, or attempted to exclude, persons from employment, without any relationship being shown, alleged, or existing between

any lawful and constitutional objective and the means sought to achieve such objective, thus depriving defendant of due process of law in violation of the Fifth Amendment; and

(c) fails to provide for a jury determination of whether the employment of defendant involves any question of the security of a national defense establishment, thus depriving him of a jury trial on an essential element of the indictment, contrary to the provisions of the Sixth Amendment.

6. The act as a whole, and section 5 (a) (1) (D) on its face, and the act and section as applied in this indictment, are void as a bill of attainder, attainting and proscribing by legislative or executive fiat, and without judicial process, a class of persons who have not been convicted of any crime, yet who are subjected to criminal penalties and made felons in the guise of regulation of lawful conduct and by prior non-judicial determinations applicable to such persons as an easily identifiable class, all contrary to the provisions of Article I, Section 9, third paragraph of the Constitution of the United States.

7. The act and the section of the act here applied, both on its face and as applied in this indictment, is void for repugnance to the Constitution, being violative of the First, Fifth and Sixth Amendments and Article I, Section 9, among other sections, in that, on its face and as applied it constitutes arbitrary and unreasonable classification of places of employment where members of the Communist Party may not work, unconstitutionally delegating broad and unlimited legislative powers to administrative officers and the private individuals and otherwise violating the Constitution.

8. The indictment in this case fails to charge an offense against the United States for the reason, among other reasons, that it fails to set forth and state certain essential elements of the offense charged, including among

others, the failure to allege that the Communist Party is, in fact, a communist action organization as defined in Section 3 of the act.

Dated this 29th day of August, 1963.

SUPREME COURT, U.S.
Office-Supreme Court, U.S.
FILED
OCT 19 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 8

UNITED STATES OF AMERICA,

Appellant,

—v.—

EUGENE FRANK ROBEL,

Appellee.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, *AMICI CURIAE*

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No. 83

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BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, *AMICI CURIAE*

Interest of *Amici Curiae*

The American Civil Liberties Union and the American Civil Liberties Union of Washington, which file this brief with consent of the parties, appear *amici curiae* in this case because they believe that Section 5(a)(1)(D) of the Subversive Activities Control Act of 1950 is unconstitutional on its face.

Indeed, the ACLU believes that the Subversive Activities Control Act is unconstitutional in its entirety. We believe that its purpose and effect is to remove from the people the right to judge ideas on their merits and to empower the government to label ideas as noxious by relying on their source alone and to penalize individuals

solely on the basis of their membership in an unpopular political organization. Cf. *DeJonge* v. *Oregon*, 299 U. S. 353 (1937).

The ACLU has appeared in every case before this Court in which any provision of the Subversive Activities Control Act was involved.[1] We appear again in this case because we believe that Congress does not have the power to exclude an individual from any form of employment solely because of membership in the Communist Party.

Statement of the Case[2]

On May 21, 1963 appellee was charged with a one count indictment filed in the United States District Court for the Western District of Washington with having violated Section 5(a)(1)(D) of the Subversive Activities Control Act of 1950, 50 U. S. C. §784(a)(1)(D). The indictment alleged: (1) that a final order of the Subversive Activities Control Board directing the Communist Party of the United States of America to register "as a Communist-action organization" had been in effect since October 20, 1961; (2) that the Secretary of Defense had, on August 20, 1962, designated the Todd Shipyards Corporation in Seattle, Washington, as a defense facility under Section 5(b) of the Subversive Activities Control Act of 1950, 50 U. S. C. §784(b); (3) that from November 19, 1962, and continu-

[1] See *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115 (1956), 367 U. S. 1 (1961); *Aptheker* v. *Secretary of State*, 378 U. S. 500 (1964); *American Committee for Protection of Foreign Born* v. *Subversive Activities Control Board*, 380 U. S. 503 (1965); *Veterans of the Abraham Lincoln Brigade* v. *Subversive Activities Control Board*, 380 U. S. 513 (1965); *Albertson* v. *Subversive Activities Control Board*, 382 U. S. 70 (1965).

[2] Adapted from Appellant's brief.

ously to the date of indictment, appellee had "unlawfully and willfully engage[d] in employment" at the Todd Shipyards Corporation "while at the same time being a member of the Communist Party of the United States of America" and "having knowledge and notice" of both the order of the Subversive Activities Control Board and the designation of the Secretary of Defense.

On October 4, 1965, the District Court dismissed the indictment because it failed to allege that appellee was "an active member of the Party, or that he is acting or has acted or intends to act to further the unlawful purposes of the Party". The Court expressed the view that if the requirements of active membership and specific intent were not "deemed implicitly in the statute", Section 5(a)(1)(D) would encounter constitutional difficulties. It held, therefore, that a valid indictment under this statute must allege, and the government must prove at trial, that "the defendant was an active or participating member of the Communist Party with knowledge of its unlawful purposes and a specific intent to advance such purposes." The government appealed to the Court of Appeals for the Ninth Circuit which, on the government's motion, certified the appeal to this Court.

ARGUMENT

I.

The statute violates the First Amendment's guarantees of freedom of speech and freedom of association.

In *Aptheker* v. *Secretary of State*, 378 U. S. 500 (1964), Section 6 of the Subversive Activities Control Act, which made it a crime for any member of "a Communist organization" to make application for a passport, was declared unconstitutional on its face on the ground that it violated the constitutionally guaranteed right to travel. The statute was struck down because it encompassed "both knowing and unknowing members", *id.* at 510, and rendered irrelevant the member's "degree of activity in the organization and his commitment to its purpose", *ibid.*, or the "security sensitivity of the area in which he wishes to travel", *id.* at 512. This Court held:

> "The section, judged by its plain import and by the substantive evil which Congress sought to control sweeps too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment. The prohibition against travel is supported only by a tenuous relationship between the bare fact of organizational membership and the activity Congress sought to proscribe. The broad and enveloping prohibition indiscriminately excludes plainly relevant considerations such as the individual's knowledge, activity, commitment, and purposes in the places for travel. The section therefore is patently not a regulation 'narrowly drawn to prevent the supposed evil', cf. *Cantwell* v. *Connecticut*, 310 U. S. at 307, yet here, as elsewhere,

precision must be the touchstone of legislation so affecting basic freedoms, *NAACP* v. *Button,* 371 U. S. at 438" (378 U. S. at 514).

The constitutional defects of Section 6 are identical to these which render Section 5 unconstitutional on its face. There is neither any requirement under the statute, nor is it charged in the indictment, that the defendant had engaged in unlawful activity, or that he had taken part in any "Communist action", either actively or inactively, or that he concurred in such action, or sympathized with it, or that he even knew that such action was taking place.[3] There is no requirement in the statute and no charge in the indictment that this defendant had committed any unlawful act of any kind in connection with his employment in the "defense facility". A blanket prohibition which applies notwithstanding the absence of any such criteria is guilt by association with a vengeance. As this Court said in *N. A. A. C. P.* v. *Alabama,* 357 U. S. 449, 460-461 (1958):

> "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. . . . It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which

[3] Moreover, there is no requirement in the statute (and no corresponding allegation in the indictment) that *any* unlawful action be taken, or even threatened, by the "Communist action organization."

> embraces freedom of speech. . . . Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to closest scrutiny."

The primacy of the First Amendment compelled this Court in *Scales* v. *United States*, 367 U. S. 203 (1961), and *Noto* v. *United States*, 367 U. S. 290 (1961), to read into the membership clause of the Smith Act, in order to sustain its constitutionality, the following ingredients: (1) That the accused was an "active member" (2) of an organization which advocated the overthrow of the government of the United States by force and violence, and that (3) the accused had a specific intent to accomplish overthrow as speedily as circumstances would permit.

The Court in *Scales* specifically held that the First Amendment was not infringed by the membership proscription of the Smith Act only because:

> "The clause does not make criminal all association with an organization which has been shown to engage in illegal advocacy. There must be clear proof that a defendant 'specifically intend[s] to accomplish [the aims of the organization] by resort to violence' . . . " 367 U. S. at 229.

On the other hand:

> "If there were a similar blanket prohibition of association with a group having both legal and illegal aims, there would indeed be a real danger that legitimate political expression or association would be impaired." *Ibid.*

In *Elfbrandt* v. *Russell*, 384 U. S. 11 (1966) this Court held unconstitutional an Arizona statute subjecting to prosecution for perjury and discharge from public office anyone who took the loyalty oath required of state employees and who thereafter "knowingly and wilfully becomes or remains a member of the Communist Party" or "any other organization" having for "one of its purposes" the overthrow of the government of Arizona, where the employee had knowledge of the unlawful purpose. The Court viewed its decisions in *Scales*, *Noto*, and *Aptheker* as recognizing that organizations may embrace both legal and illegal aims and established beyond any legal doubt that "proscription of mere knowing membership, without any showing of 'specific intent' [to further the unlawful aims of the organization], would run afoul of the Constitution." 384 U. S. at 16.

Since the Arizona statute was not restricted in scope to employees who joined a forbidden organization with a specific intent of furthering the organization's illegal objectives, but instead subjected to immediate discharge and criminal penalties *all* employees who were knowing members, this Court concluded that it infringed the freedom of association protected by the First and Fourteenth Amendments. The Court stated, in language particularly pertinent here, that:

> "Those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat, either as citizens or as public employees. Laws such as this which are not restricted in scope to those who join with the 'specific intent' to further illegal action impose, in effect, a conclusive presumption that the member shares the unlawful aims of the organization. . . .

"This Act threatens the cherished freedom of association protected by the First Amendment . . . A statute touching those protected rights must be 'narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the state.' . . . Legitimate legislative goals 'cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' . . . " 384 U. S. at 18.

The Government attempts to distinguish *Aptheker* v. *Secy. of State*, 378 U. S. 500 (1964) by making essentially two arguments: (1) that the risk to national security which Section 5(a)(1)(D) guards against is a much greater risk, than that guarded against by Section 6; and (2) that a restriction on freedom of travel is "more basic" than a restriction "which affects only the right to be employed in a defense facility" (Gov. Brief, pp. 46-47). In effect, the Government argues that in *Aptheker* there was less danger to national security, and a greater infringement on liberty, than there is here. Neither argument is tenable. Such evidence as is available refutes rather than supports the Government's contention.

In the Congressional findings of necessity, in Section 2 of the statute, Title 50, U. S. C., §781, one of the principal areas of concern expressed by Congress is the considerable movement in and out of the United States of "subversive" persons whose travel is in furtherance of the purposes of the "*world* Communist movement . . . to establish a Communist totalitarian dictatorship in the countries *throughout the world* . . . " (¶1). It is stated, in paragraph 4 of the findings that "The direction and control of the *world* Com-

munist movement is vested in and exercised by the Communist dictatorship of a *foreign* country". And in paragraph 5, Congress has found that one of the functions of the *world* Communist movement is to spread its activities to various other countries as part of a "*world-wide* Communist organization . . . subject to the discipline of the Communist dictatorship of such *foreign* country." References to the constant world-wide activities of the world Communist movement, and of which Communist action organizations in the United States are a disciplined part, are liberally distributed among most of the 15 paragraphs of Congressional findings. See paragraphs 6, 7, 8, 9, 10, 12, 13 and 14.

Paragraph 8 refers particularly to "*travel* of Communist members, representatives, and agents *from country to country*" which "facilitates communication and is a prerequisite for the carrying on of activities to further the purposes of the Communist movement." Paragraph 12 refers further to *world-wide* travel back and forth as facilitating the aims of the Communist movement, and paragraphs 13 and 14 deplore the existence of loopholes in the immigration and nationality laws. (Emphasis added in all references to statutes.)

On the other hand, none of the paragraphs in the Congressional findings contain any reference to the danger to the national security which is presumably sought to be protected by Section 5(a)(1)(D). In paragraph 11, there is a reference to "clever and ruthless espionage and sabotage tactics which are carried out in many instances in form or manner successfully evasive of existing law". But if this is what Section 5(a)(1)(D) is meant to deal with, there is no support therefor in the legislative history presented in the

Government's brief (pp. 32-34). And even if the Government's attempt to have 1962 legislative history retroactively applied to 1950 (Gov. Brief, pp. 33-34) is of any persuasiveness, it is surely a much weaker case than all of the specifications in the statute itself, and in the legislative history, which show the *world-wide* nexus of international Communist travel as an area of prime Congressional concern.[4]

The Government's argument that there is a greater individual freedom at stake when the right of travel is restricted than where the right of employment is restricted, is perhaps wider of the mark than the effort to distinguish *Aptheker* in terms of lesser danger. Although large numbers of Americans travel and utilize passports, surely the number of Americans who must work for a living is even greater than the number who travel abroad, for whatever reason. Indeed, an element of the right to travel is the right to travel for the purpose of seeking and obtaining employment elsewere. *Kent* v. *Dulles*, 357 U. S. 116, 126 (1958). See *Edwards* v. *California*, 314 U. S. 160 (1941). As Mr. Justice Goldberg pointed out in *Aptheker*, *supra*, one of the vices of Section 6 was that it would prevent a scholar from doing research at a European university. However, the restriction of Section 5(a)(1)(D) does not just apply to a scholar who wants to read rare manuscripts at

[4] Compare the thorough elaboration of legislative history of travel restrictions set forth in pages 25-35 of the Government's Brief in *Aptheker* v. *Secretary of State*, 378 U. S. 500 (1964). There is nothing in the Government's Brief in *Aptheker* which even remotely suggests that travel restrictions involve "a much lesser risk to national security" (Gov. Brief, this case, p. 46) than *any* other restrictions.

the Boedleian Library at Oxford. It applies to millions of Americans who might want to work in a shipyard.[5]

That "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom" which is protected by substantive due process, has been clear at least since *Truax* v. *Raich*, 239 U. S. 33, 41 (1915). In *Greene* v. *McElroy*, 360 U. S. 474, 492 (1959), this Court held that "the right to hold specific private employment" was protected by the Fifth Amendment against the Federal Government's unreasonable interference.

Though, it might be argued that the right to work is no more precious than the right to travel abroad, it is totally baseless to argue, as does the Government, that the right to foreign travel is a *more* fundamental liberty than the right to work in one's own country. It follows that if *Aptheker* is undistinguishable, this Court must rule here as it did there.

In an additional attempt to sustain the constitutionality of Section 5(a)(1)(D), the government resorts to constitutionally impermissible generalities regarding the danger

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[5] Because of the proportions of the sanction involved, restrictions on the "basic individual right to work" cannot be justified on the same grounds as would justify restricting a right to hold union office. See *Aptheker* v. *Secretary of State*, 378 U. S., at 513, n. 11. Consequently, the constitutional validity of §9(h) of the Taft-Hartley Act, *American Communications Assoc.* v. *Douds*, 339 U. S. 382 (1949), is no precedent for the constitutional validity of §5(a)(1)(D). The attempt in the Government's Brief (pp. 31, 45, 48), to secure the imprimatur of this Court on basic restrictions of the individual right to work, by reference to *Amer. Comm. Asso.* v. *Douds, supra*, is unsupportable and must fail. See *United States* v. *Brown*, 381 U. S. 437 (1965).

which that section is said to be directed against.[6] For example, the government says that Section 5(a)(1)(D) "was designed to protect essential defense installations against sabotage and espionage" (Gov't. Brief, p. 14); that the Section is "part and parcel of the Federal Loyalty-Security Program which is designed to prevent espionage and sabotage within the Federal government and in defense installations" (*Id.* at 15); that the legislative history of the Section shows "general agreement on the proposition that substantial dangers of espionage and sabotage were presented by the employment in defense facilities of members of Communist organizations" (*Id.* at 25); that "The employment of known Communists in this type of facility enhances the possibilities of sabotage. Common sense dictates

[6] It is extremely interesting to note that notwithstanding all of the Government's bold generalizations about how §5(a)(1)(D) aids the national security, not a single specific instance has been cited, either from case reports, reports of the Subversive Activities Control Board, or any other documented source, indicating the existence of an industrial security problem which only §5(a)(1)(D) can solve. We have had the Subversive Activities Control Act for sixteen years, and it was in existence for almost thirteen years prior to the indictment of appellee. Surely if the security of the Republic has suffered because of the absence of the protections and sanctions of §5(a)(1)(D), it would have been apparent in some documentable way.

On page 28 of the Government's Brief, the Court is advised "that the total number of facilities designated by the Secretary of Defense is approximately 3,000" comprising less than 1% of all manufacturing and production plants in the country. But the Court is not advised as to the number of employees covered. Nor is the Court advised of the number of security incidents, or of even a single incident, although the Government characterizes this information as "statistics" (Brief, p. 29).

In a final resort to hyperbole, the alarm is sounded lest "vital nuclear secrets" be made available to persons such as appellee (Gov't. Brief, p. 56). But it is elementary that the protection of our nation's nuclear secrets does not rest on such a clumsy device as §5(a)(1)(D).

the removal of such individuals from these plants." (*Id.* at 26, quoting testimony given to a Senate Subcommittee on Internal Security five years after the statute was passed.) And finally "In this case the 'end' is the protection of defense facilities essential to the national security from espionage and sabotage" (*Id.* at 30). And the government concludes "The means chosen—(1) an absolute prohibition upon employment in such facilities (2) of members of Communist-action organizations (3) punishable by imprisonment and fine—are plainly 'appropriate' to that end" (*Ibid.*).

The Government may regard Section 5(a)(1)(D) as "appropriate" to protect the national security, just as it similarly regarded Section 6. *Aptheker* v. *Secretary of State*, 378 U. S. 500, 505 (1964). But this Court ruled in *Aptheker* that the First Amendment will not tolerate a statute which, in a purported attempt to protect the national security, imposes criminal guilt without regard to the defendant's knowledge of wrongdoing, degree of wrongdoing, or even the objective existence of wrongdoing. *Amici* urge that this Court must likewise declare that §5(a)(1)(D) is violative of the First Amendment, and for the same reasons of overbreadth.

Protection against espionage and sabotage is certainly a legitimate and proper function of government. Where the First Amendment is involved, however, it is only a "narrow exception to freedom of expression which a state may carve out to satisfy the adverse demands of other interests of society." *Burstyn* v. *Wilson*, 343 U. S. 495, 505 (1952). Though Congress has constitutional authority to legislate in the area of espionage and sabotage, it may do so only

with a scalpel, not a broadsword.[7] See *Lovell* v. *Griffin*, 303 U. S. 404 (1938); *Schneider* v. *State*, 308 U. S. 147 (1939); *Carlson* v. *California*, 310 U. S. 106 (1940).

The government has recognized this constitutional limitation, at least in other cases. For example, in *McBride* v. *Roland*, U. S. Court of Appeals for the Second Circuit, Docket No. 30331 (argued October 6, 1966), the Court of Appeals has under review an appeal on behalf of a merchant seaman who was denied security clearance under the government's port security program because of long held, though now terminated, membership in the Communist Party. Appellant attacked the relevant Coast Guard regulations (33 CFR §§121.01-121.29), arguing that they are unconstitutional on their face because they exclude merchant mariners from employment solely because of bare membership in the Communist Party. The government responded (Gov. Brief, p. 33):

> "The short answer is that the regulation clearly requires a careful examination of the qualitative and quantitative nature of the applicant's 'membership' since it provides only that such membership 'may preclude' validation of his mariner's document. The language of the regulation certainly warrants the conclusion that bare membership in the Communist Party, unaccompanied by knowledge of the Party's illegal objectives, would not support denial of security clearance."

Thus the government is perfectly capable of acknowledging what Mr. Justice Douglas said in *Black* v. *Cutter Laboratories*, 351 U. S. 292, 304 (1956) (dissenting opinion):

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[7] See 18 U.S.C. Chap. 37 (Espionage) and Chap. 105 (Sabotage).

> "I do not think we can hold consistently with our Bill of Rights that Communists can be proscribed from making a living on the assumption that wherever they work the incidence of sabotage rises or that the danger from Communist employees is too great for critical industry to bear."

That it fails to acknowledge it in this case reflects an inflexible attachment to a period of national history that is stale at best. Cf. *Veterans of the Abraham Lincoln Brigade* v. *Subversive Activities Control Board,* 380 U. S. 513 (1965).

II.

The statute violates the Fifth and Sixth Amendments.

The most significant element of the crime charged is that appellee is a member of an organization which has been ordered to register as a "Communist action organization." But under the statute and the indictment, proof that the organization to which the defendant belongs is in fact a "Communist action organization" is not judicially determined with the traditional constitutional safeguards accorded defendants in general. This ultimate fact, rather, has been determined in advance of trial by the Subversive Activities Control Board without any notice to appellee, without his being confronted with his accusers, without the right of jury trial, without the proof of the facts beyond reasonable doubt. In addition, this determination was made many years before the date appellee is charged with having any connection with the Party.[8]

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[8] In *Communist Party* v. *Subversive Activities Control Board,* 367 U. S. 1, 113 (1961) Mr. Justice Frankfurter was careful to

As a consequence of the statutory scheme, the triers of fact are left with nothing to try. Appellee's criminality has been determined in advance of trial. To declare certain acts "to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the sphere of constitutional legislation, unless provision were made that the fact of guilt should first be established by a judicial trial." *Wong Wing* v. *United States,* 163 U. S. 228, 237 (1896).

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point out that many of the factual referents in the statute which formed the constitutional basis for the validity of the order requiring the Communist Party to register as a Communist action organization, might be subject to change as world conditions changed:

> "If, in future years, in a future world situation, the Soviet Union is no longer the foreign country to which . . . [certain sections of the statute] refer—so that substantial domination by the Soviet Union would not bring an organization within the terms of . . . [the Act] that too will be a matter of statutory construction . . . The Board or a reviewing court will be able to say that the 'world Communist movement', as Congress meant the term in 1950 . . . no longer exists, or that Country X or Y, not the Soviet Union, now directs it."

Under the indictment as drawn, or even under a hypothetical indictment which might be redrawn consonant with the District Court's opinion, it would be impossible for appellee to introduce any evidence tending to show precisely those changes which Mr. Justice Frankfurter, writing for the Court, foresaw as very much within the realm of possibility.

CONCLUSION

For the reasons stated above, the decision of the District Court should be affirmed.

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OCTOBER TERM, 1967

No. 8

UNITED STATES OF AMERICA, APPELLANT

v.

EUGENE FRANK ROBEL

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF FOR THE UNITED STATES ON REARGUMENT

STATEMENT

On June 5, 1967, the Court entered the following order in this case:

> This case is restored to the calendar for reargument and counsel are directed to brief and argue, in addition to the questions presented, the question whether the delegation of authority to the Secretary of Defense to designate "defense facilities" satisfies pertinent constitutional standards.

We here address ourselves to this additional question, without attempting to reargue the issues in the case

covered in our brief on the merits submitted last Term.[1] Nor do we deem it necessary to restate the facts of the case.

In summary, the scheme of the Subversive Activities Control Act of 1950 (64 Stat. 987, as amended, 50 U.S.C. 781, *et seq.*),[2] insofar as it relates to our case, is as follows. Section 5(a) makes it unlawful for any member of a Communist-action organization[3] to seek employment or to be employed in a defense facility, so designated by the Secretary of Defense. Section 3(7) defines a "facility" as "any plant, factory or other manufacturing, producing or service establishment, airport, airport facility, vessel, pier, water-front facility, mine, railroad, public utility, laboratory, station, or other

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[1] We do add this brief comment. Appellee, in his original brief, challenged the Act on due process grounds because it deprived him of the right to have the jury pass on the validity of the Board's determination that the Communist Party is a "Communist-action organization" or the reasonableness of the Secretary's action in designating the Todd Shipyards as a "defense facility." Since the Act gives the Party, or a registered member, the right to periodically contest the Board's determination and to obtain judicial review of that determination (Sections 13 and 14) there would seem to be no need for further review in the criminal trial. See *Yakus* v. *United States*, 321 U.S. 414. In any event, to the extent that appellee is entitled to show that the findings of the Board and the Secretary are so bereft of factual support that they provide no rational basis for the enforcement of the Act, see *United States* v. *Carolene Products Co.*, 304 U.S. 144, the question presented would be one for the judge to decide on motion, rather than an issue for the jury. *Cox* v. *United States*, 332 U.S. 442.

[2] The pertinent provisions of the statute are set out in full in the Appendix, *infra*, pp. 13-15.

[3] Under the statute, Section 5(a)(1)(D) could not become effective until there was a "Communist organization" within the statutory definition, *i.e.*, one that is registered or concerning which there is in effect a final order to register pursuant to the Internal Security Act of 1950. Thus, the effective date of Section 5(a) was delayed until the registration order became final on October 20, 1961.

establishment or facility, or any part, division, or department of any of the foregoing," and defines "defense facility" as any facility designated by the Secretary of Defense pursuant to Section 5(b). Section 5(b) authorizes and directs the Secretary of Defense to designate any "facility" as a "defense facility" upon a finding and determination that "the security of the United States requires the application of the provisions of subsection (a)."

SUMMARY OF ARGUMENT

In enacting the Subversive Activities Control Act, Congress clearly expressed its intention to protect facilities vital to the national defense from espionage and sabotage by precluding members of Communist-action organizations from employment therein. In leaving the determination of which particular facility required this protection to the Secretary of Defense, Congress was merely conferring on the Secretary the duty to determine the facts upon which the enforcement of its enactment would depend. Such a delegation of power has long been recognized as a proper and, indeed, necessary method of legislating. Moreover, even if the original delegation of power to the Secretary was not sufficiently precise to meet the constitutional standard, the subsequent amendment of the statute by Congress, with full knowledge of the standards adopted by the Secretary for designating defense facilities, constituted an adoption of those standards by Congress and cures any overbreadth in the original delegation.

ARGUMENT

The Delegation of Authority to the Secretary of Defense to Designate "Defense Facilities" Is Constitutional

At the outset, we emphasize that the question of delegation in this case involves only the doctrine of separation of powers. There is, as to the appellee, no issue of adequate notice or of fair warning. Indeed, whether or not the statute in suit fails sufficiently to define the limits of the Secretary's discretion, the legislative text itself makes clear that certain installations obviously vital to the national security will be covered —and it is hardly debatable that a major shipyard is within that description. But, in any event, appellee cannot complain that the statute punishes without warning since the provision invoked against him imposes liability only after a written notice has been posted disclosing that the employer's enterprise has been designated by the Secretary of Defense as a defense facility. Section 5(b) (Appendix, *infra,* p. 15).[4] Moreover, here, the indictment expressly alleges that appellee had actual knowledge that Todd Shipyards had been so designated (R. 2).

So saying, we do not intend to denigrate the interest of every citizen in the constitutional rule that truly legislative powers must be exercised by the legislative branch alone; nor do we challenge appellee's standing to invoke that rule here. On the other hand, it seems appropriate to stress that the question of delegation, in the present context, presents no question of

[4] Before any penalty attaches under Section 5(a), the employee must also know that the organization to which he belongs has been finally determined to be a "Communist-action organization."

fairness to the particular appellee. With this preface, we turn to consider whether the delegation of authority to the Secretary of Defense to designate defense facilities satisfies the constitutional standard.

There can be no dispute that the Constitution prohibits Congress from abnegating its legislative responsibility by an unwarranted delegation of legislative power to the Executive. See *A.L.A. Schechter Poultry Corp.* v. *United States,* 295 U.S. 495. But it does not follow that Congress may never delegate authority to make subsidiary determinations. As the Court observed in *Yakus* v. *United States,* 321 U.S. 414, 424:

> The Constitution as a continuously operative charter of government does not demand the impossible or the impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate. . . .

The necessity for such a flexible rule was authoritatively stated in *Union Bridge Co.* v. *United States,* 204 U.S. 364. After canvassing the prior cases involving delegation of power to the Executive, the Court there concluded at 387:

> Indeed, it is not too much to say that a denial to Congress of the right, under the Constitution, to delegate the power to determine some fact or the state of things upon which the enforcement of its

> enactment depends would be "to stop the wheels of government" and bring about confusion, if not paralysis, in the conduct of the public business.

Thus, it has been consistently held that there is no unlawful delegation of congressional power where the act which confers power on the executive sets forth, so far as reasonably practicable, the legislative purpose and an intelligible principle to govern the implementation of that purpose. *Lichter* v. *United States,* 334 U.S. 742; *Yakus* v. *United States, supra; Hirabayashi* v. *United States,* 320 U.S. 81; *United States* v. *Rock Royal Co-operative,* 307 U.S. 533, 574; *Fahey* v. *Mallonee,* 332 U.S. 245; *United States ex rel. Knauff* v. *Shaughnessy,* 338 U.S. 537. In other words, "Congress does not abdicate its functions where it describes what job must be done, who must do it, and what is the scope of his authority." *Bowles* v. *Willingham,* 321 U.S. 503, 515.

Applying these principles to the present case, it is evident that there has been no unconstitutional delegation of congressional power to the Secretary of Defense. The only determination which the statute leaves to the Secretary is whether a "facility" as defined in Section 3(7) should be designated a "defense facility". And the Secretary may make such a designation only if he "finds and determines that the security of the United States requires the application" of the protective provisions of subsection (a) to such facility. Viewing this standard "in [the] light of the conditions to which they are to be applied," as we must (*Lichter* v. *United States, supra,* 334 U.S. at 785), it seems plainly sufficient.

1. The Internal Security Act of 1950 as a whole clearly discloses the congressional purpose to be effectuated and provides reasonable guides for the Secretary in determining when "the security of the United States" requires him to designate a facility as a defense facility. Section 2 of the Act sets forth detailed findings concerning the worldwide Communist movement, which Congress concluded presented a clear and present danger to "the security of the United States." Section 2(15). Included was the finding that "[t]he agents of communism have devised clever and ruthless espionage and sabotage tactics." Subsection 11. In addition, Title II of the Act contained a congressional finding that "[t]he security and safety of the territory and Constitution of the United States * * * require every reasonable and lawful protection against espionage, and against sabotage to national-defense material, premises, forces, and utilities, including related facilities for mining, manufacturing, transportation, research, training, military and civilian supply, and other activities essential to national defense." Section 101(11). These findings unmistakably proclaim the policy of Congress to protect vital facilities from espionage and sabotage by members of Communist-action organizations and supply reasonable guidelines to determine when, in the intendment of Congress, the security of the United States would require the exclusion of members of Communist action groups from employment in a particular facility.[5]

[5] It is significant to note that determinations based on an assessment of what is necessary to the "security of the United States" are not peculiar to the provision in issue here. Section 4 of the Act, subsections (b) and (c), provides criminal penalties for the com-

Since Congress did no more than give the Secretary the power to determine when the facts justified the implementation of the legislative purpose, there was no unconstitutional delegation of congressional power. "The essentials of the legislative function are preserved when Congress authorizes a statutory command to become operative upon ascertainment of a basic conclusion of fact by a designated representative of Government." *Hirabayashi* v. *United States,* 320 U.S. 81, 104.

This case is no different from many others in which this Court has sustained the power of Congress to delegate fact-finding functions to executive agencies. Thus, in *Bowles* v. *Willingham,* 321 U.S. 503, the Court sustained the delegation to the Administrator of the Office of Price Administration of the power to stabilize or reduce rents "[w]henever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purpose of this Act." Similarly, in *Yakus* v. *United States,* 321 U.S. 414, the Court found nothing improper in conferring on the Price Administrator the power to promulgate regulations fixing prices of commodities which "in his judgment will be generally fair and equitable and will effectuate the purpose of this Act." See, also, *United States ex rel. Knauff* v.

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munication or receipt of information which has been classified "as affecting the security of the United States." See *Scarbeck* v. *United States,* 317 F. 2d 546 (C.A. D.C.). Similarly, 18 U.S.C. 798 makes criminal the unauthorized disclosure of certain information "for reasons of national security, specifically designated by a United States Government Agency for limited or restricted dissemination of distribution." See, also, *Dakota Central Telephone Co.* v. *South Dakota,* 250 U.S. 163, in which this Court sustained the enforcement of a statute giving the President the power in time of war to seize telephone and telegraph facilities "whenever he shall deem it necessary for the national security."

Shaughnessy, 338 U.S. 537 (sustaining the grant of power to the President "upon finding that the interests of the United States required it, [to] impose additional restrictions and prohibitions on the entry into and departure of persons from the United States"); *Hirabayashi* v. *United States,* 320 U.S. 81, 86 (sustaining a conviction for violating a curfew imposed pursuant to an Act of Congress which did "authorize and direct the Secretary of War, and the Military Commanders * * * whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any and all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion"); *New York Central Securities Corp.* v. *United States,* 287 U.S. 12; *Tagg Bros.* v. *United States,* 280 U.S. 420; *Avent* v. *United States,* 266 U.S. 127.

2. Even if the initial delegation of power to the Secretary of Defense had not constituted a sufficiently precise delineation of congressional purpose to satisfy the constitutional test, the defect would be cured by the subsequent amendment of a portion of the statute by Congress, with full knowledge of the standards which the Secretary of Defense would use in designating defense facilities. See *Zemel* v. *Rusk,* 381 U.S. 1, 17-18; *Hirabayashi* v. *United States,* 320 U.S. 81.

In early 1962, H.R. 9753 was introduced in Congress

to amend Sections 3(7) and 5(b) of the Internal Security Act of 1950. The purpose of this bill was to delete the requirement that the Secretary publish a list of the designated defense facilities in the Federal Register.[6] The representative of the Secretary of Defense who appeared before the Committee on Un-American activities in support of the bill expressed the fear that the publication of a list of defense facilities would provide a target list for potential sabotage.[7] He further informed the Committee that a tentative list of facilities deemed so vital as to require the application of the provision of the Act barring members of Communist organizations had been prepared and included facilities engaged in the following activities:

(1) top secret projects;

(2) production of the most essential weapons systems and most critical military end items and components;[8]

(3) production of essential common components, intermediates, and basic and raw materials; and

(4) important utility and service facilities and

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[6] Hearings Before the House Committee on Un-American Activities, 87th Cong., 2d Sess., entitled "Hearing Relating to H.R. 9753, to Amend Sections 3(7) and 5(b) of the Internal Security Act of 1950, as Amended, Relating to Employment of Members of Communist Organizations in Certain Defense Facilities." H. Rep. No. 1362 (to accompany H.R. 9753), 87th Cong., 2d Sess.; and S. Rep. No. 1443, U.S. Code Cong. and Admin. News, 87th Cong., 2d Sess., 1962, Vol. 1, pp. 1661-1666.

[7] Statement of Assistant General Counsel, Department of Defense before the House Committee on Un-American Activities, S. Rep. No. 1443 and H. Rep. No. 1362, U.S. Code Cong. and Admin. News, 87th Cong., 2d Sess., 1962, Vol. 1, pp. 1664-1665; and H. Rep. No. 1362, pp. 6-7.

[8] An explanation of "components" is in our original brief, at p. 27, n. 10.

other industrial and research installations whose operations and contributions to the national defense efforts are of utmost importance.

He further informed the Committee that "[t]his list is made up of facilities which are so essential to the interests of national security as to require the exclusion of members of Communist organizations required to register under the Act."

Being fully advised of the interpretation given the statute by the Secretary of Defense, as shown in the reports from the two Committees, Congress on May 31, 1962, enacted H.R. 9753 and amended Section 5(b) to delete the requirement that the "list" of defense facilities be published in the Federal Register (Pub. L. 87-474, 76 Stat. 91), but did not change the standards to be used by the Secretary in designating defense facilities. This congressional ratification of the standards adopted and applied by the Secretary[9] (see *Hirabayashi* v. *United States,* 320 U.S. 81, 91; *Zemel* v. *Rusk,* 381 U.S. 1, 17-18) fully answers any claim that the Secretary of

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[9] The Department of Defense on August 20, 1962, announced action by the Secretary of Defense to implement these provisions of the Internal Security Act, as amended, and described the types of facilities to be designated pursuant to Section 5(b), as follows:

1. Facilities engaged in important classified military projects.
2. Facilities producing important weapons systems, subassemblies and their components.
3. Facilities producing essential common components, intermediates, basic materials and raw materials.
4. Important utility and service facilities.
5. Research laboratories whose contributions are important to the national defense.

Dept. of Defense Press Release No. 1363-62, issued August 20, 1962; App. A to our original brief on the merits, Oct. Term, 1966, pp. 58-59 *infra.*

Defense has been left too much at large by the original delegation. No doubt remains that Congress itself determined to impose a penalty on those in appellee's situation.

CONCLUSION

For the reasons stated here and in our brief filed last Term, it is respectfully submitted that the judgment of the court below should be reversed.

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AUGUST 1967.

APPENDIX

STATUTE INVOLVED

The Subversive Activities Control Act of 1950, 64 Stat. 987, as amended, 50 U.S.C. 781, *et seq.*, provides in pertinent part:

Sec. 3. For the purposes of this title—

* * * * *

(3) The term "Communist-action organization" means—

(a) any organization in the Untied States (other than a diplomatic representative or mission of a foreign government accredited as such by the Department of State) which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 of this title, and (ii) operates primarily to advance the objectives of such world Communist movement as referred to in section 2 of this title; * * *

* * * * *

(5) The term "Communist organization" means any Communist-action organization, Communist-front organization, or Communist-infiltrated organization.

* * * * *

(7) The term "facility" means any plant, factory or other manufacturing, producing or service establishment, airport, airport facility, vessel, pier, water-front facility, mine, railroad, public utility, laboratory, station, or other establishment

or facility, or any part, division, or department of any of the foregoing. The term "defense facility" means any facility designated by the Secretary of Defense pursuant to section 5(b) of this title and which is in compliance with the provisions of such subsection respecting the posting of notice of such designation.

* * * * *

Sec. 5. (a) When a Communist organization, as defined in paragraph (5) of section 3 of this title, is registered or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful—

(1) For any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

(A) in seeking, accepting, or holding any nonelective office or employment under the United States, to conceal or fail to disclose the fact that he is a member of such organization; or

(B) to hold any nonelective office or employment under the United States; or

(C) in seeking, accepting, or holding employment in any defense facility, to conceal or fail to disclose the fact that he is a member of such organization; or

(D) if such organization is a Communist-action organization, to engage in any employment in any defense facility; or

* * * * *

(b) The Secretary of Defense is authorized and directed to designate facilities, as defined in paragraph (7) of section 3 of this title, with respect to the operation of which he finds and determines that the security of the United States requires the application of the provisions of subsection (a) of this section. The Secretary shall promptly notify the management of any facility so designated, whereupon such management shall immediately post conspicuously notice of such designation in such form and in such place or places as to give notice thereof to all employees of, and to all applicants for employment in, such facility. Such posting shall be sufficient to give notice of such designation to any person subject thereto or affected thereby. Upon the request of the Secretary, the management of any facility so designated shall require each employee of the facility, or any part thereof, to sign a statement that he knows that the facility has, for the purposes of this title, been designated by the Secretary under this subsection.

The pertinent portion of Section 15, 50 U.S.C. 794, the penalty provision, reads:

(c) * * * Any individual who violates any provision of [section 5] * * * of this title shall, upon conviction thereof, be punished for each such violation by a fine of not more than $10,000 or by imprisonment for not more than five years, or by both such fine and imprisonment.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 8

UNITED STATES OF AMERICA,
Appellant,

v.

EUGENE FRANK ROBEL,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF FOR APPELLEE ON REARGUMENT

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STATEMENT

The order for reargument of June 5, 1967, directed counsel to brief "the questions presented" in addition to the question framed by the Court concerning the delegation of authority to the Secretary of Defense.

The brief for the government on the initial argument presented two questions:

1. Whether active membership, knowledge of unlawful organizational purposes, and an intent to effectuate them

are elements of the offense defined in section 5(a)(1)(D) of the Act.[1]

2. If not, whether the section violates substantive due process and the First Amendment.

Appellee's answering brief presented four additional questions (pp. 2, 38-62):

1. Whether the indictment is defective in failing to allege that the Communist Party *is* (and not merely that it has been ordered to register as) a Communist-action organization.

2. If not, whether section 5(a)(1)(D) is unconstitutional because it violates procedural due process, denies the requirements of indictment, jury trial and proof beyond a reasonable doubt, and is a bill of attainder.

3. Whether the section denies procedural due process because of its failure to afford affected persons an opportunity for a hearing on or judicial review of the designations of defense facilities by the Secretary of Defense.

4. Whether the registration order against the Communist Party has been invalidated by facts susceptible of judicial notice establishing the non-existence of a world Communist movement as described in section 2 of the Act.

The government did not file a reply, and thus failed to brief the additional questions presented by appellee. Nor has it briefed any of these questions in its brief on reargument despite the Court's order directing it to do so.[2]

All of the questions presented were fully discussed in appellee's initial brief. In what follows, therefore, we confine ourselves to noting the relevance to these questions of two

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[1]The government (Br. 48) and appellee (Br. 38) agree that they are not.

[2]The footnote in its brief on reargument (p. 2, n. 1) which garbles several of appellee's contentions into an unrecognizable jumble is obviously not compliance with the Court's order. And see *infra*, p. 13, n. 8.

decisions rendered since the argument,[3] and to a discussion of the delegation question to which the Court has directed the attention of counsel.

ARGUMENT

I.

The Act's delegation of authority to the Secretary of Defense to designate "defense facilities" violates the constitutional prohibition against delegating legislative power.

Section 5(a) of the Act prohibits members of the Communist Party (once the order that it register as a Communist-action organization became final) from engaging in employment in any "facility" that the Secretary of Defense designates as a "defense facility."

Section 3(7) defines "facility" as any producing, manufacturing or service establishment, mine, transportation facility, public utility, laboratory, "or other establishment or facility, or any part, division, or department of any of the foregoing." The term therefore encompasses practically every enterprise that employs people.

Section 5(b) authorizes the Secretary of Defense to designate as a "defense facility" any such enterprise "with respect to the operation of which he finds and determines that the security of the United States requires the application of the provisions" of section 5(a). In other words, the Secretary can make it a crime for a Communist to work in any "facility" (i.e., almost anywhere) simply by finding that "the security of the United States so requires."

This authority lacks any objective standards or administrative procedures to control its exercise. It therefore gives

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[3] *Communist Party v. United States*, ___ F.2d ___ (C.A.D.C. Mar. 3, 1967), and *Keyishian v. Board of Regents*, 385 U.S. 589.

the Secretary substantially unlimited discretion to curtail and virtually to eliminate opportunities for employment open to Communists. In this aspect, the Act delegates legislative power to the Secretary in violation of Article I, sec. 1 of the Constitution.

A. The Act does not define the phrase, "the security of the United States." Nor does it adumbrate considerations for the guidance of the Secretary in determining whether the exclusion of Communists from employment in a particular "facility" or class of "facilities" is required by "the security of the United States," however defined.

No standard to govern the Secretary's discretion can be spelled out of the recitals of section 2. Section 2(15) declares that, "The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States," and require "appropriate legislation recognizing the existence of such world-wide conspiracy and designed to prevent it from accomplishing its purpose in the United States." While this section speaks of "the security of the United States," there is nothing in its welter of rhetoric from which any limitation on the Secretary's power to make designations under section 5(b) can be implied.

Section 2(11), the only other recital even remotely relevant to the Secretary's authority under 5(b), finds that, "The agents of Communism have devised clever and ruthless espionage and sabotage tactics which are carried out in many instances in form or manner successfully evasive of existing law." The nature of these "tactics" is not described, and there is no finding that they involve the employment of Communists in "facilities." The recital, therefore, provides no clue to the criteria that Congress intended the Secretary to apply in administering section 5(b). Moreover, as we have shown (Brief for Appellee, 21-23, 31-33) the finding of section 2(11) is belied by the facts as well as by the find-

ings of the Subversive Activities Control Board with respect to the activities of the Communist Party and its members.

The government argues (Br. on Rearg. 7) that the specification in section 101(11) of Title II of the Internal Security Act (50 U.S.C. 811(11)) of certain defense installations and activities can be construed as a restriction on the authority of the Secretary of Defense to designate "defense facilities" under Title I. No such construction of the statute is possible. Title II, which provides for the "emergency detention of suspected security risks," delegates no authority to the Secretary and makes no reference to the designation of "defense facilities." The only inference that can be drawn from the omission from Title I of a specification of installations and activities such as appears in Title II is that Congress did not intend any such restrictive construction of the term "defense facilities."

The Act therefore contains no objective standard to govern the exercise of the Secretary's power under 5(b). His only guide is his judgment as to what "the security of the United States requires." But any judgment on that issue is necessarily subjective. It rests on views as to policy which are incapable of verification by reference to objective factors and are shaped primarily by the predilections of the man who makes the judgment.

Justice Jackson observed that, "Security is like liberty in that many are the crimes committed in its name." *Knauff v. Shaughnessy*, 338 U.S. 537, 551 (dissenting opinion). His observation reflects the nature of the "security" concept which, chameleon-like, changes coloration to match the complexion of the particular individuals who undertake to interpret and apply it. This is exemplified in the legislative history of the Act.

Congress found in section 2(15) that "the security of the United States" required the legislation. But President Truman stated in his veto message that, "in actual operation the bill would have results exactly the opposite of those intended," and "would actually weaken our existing internal

security measures." H.R. Doc. No. 708, 81st Cong., 2d Sess., p. 1. If Congress and the President could arrive at these contradictory determinations of what "the security of the United States requires," it is plain that the phrase provides no ascertainable standard for administrative action and can place no meaningful limitation on the Secretary's discretion under section 5(b).

It is beyond dispute that the section would be unconstitutional as a delegation of legislative power if it had omitted the reference to "the security of the United States" and, in terms, permitted the Secretary to designate "defense facilities" at will. In that form, the section would be indistinguishable from section 9(c) of the N.I.R.A., invalidated in *Panama Refining Co. v. Ryan*, 293 U.S. 388. The latter statute, which authorized the President to prohibit the interstate transportation of so-called "hot oil," was described by the Court as follows (at 414-415):

> "The section purports to authorize the President to pass a prohibitory law. The subject to which this authority relates is defined . . . So far as this section is concerned, it gives the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit. And disobedience to his order is made a crime punishable by fine and imprisonment."

Similarly, section 5(b) authorizes the Secretary "to pass a prohibitory law," the subject of which is defined (the employment of Communists in a "facility" that he designates), and disobedience of which is made a crime. As we have shown, the reference in the section to "the security of the United States" places no significant limitation on the authority of the Secretary "to determine the policy and to lay down the prohibition, or not to lay it down." Accordingly, the decision in *Panama* is controlling. Otherwise, what it characterized (at 430) as "the constitutional processes of legislation which are essential to our form of government" could be circumvented by a meaningless exercise in semantics.

B. The unlimited nature of the Secretary's authority to "lay down the prohibition [against the employment of Communists], or not to lay it down" is underscored by the omission from section 5(b) of any direction that the Secretary find the facts on which he bases his determination that the prohibition is required by "the security of the United States." This omission makes it all the more apparent that Congress was not prescribing an intelligible policy and confining the Secretary to its implementation when he finds that certain ascertainable facts exist. Instead, Congress authorized him to determine policy for himself, based on considerations of his own choice. Such a delegation is unconstitutional under *Panama.*

Section 5(b) therefore lacks what *Yakus v. United States,* 321 U.S. 414, 424, characterized as the "essentials of the legislative function." These are *(ibid.)*, "the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct." They are preserved (*id.* 424-425) "when Congress has specified the basic conditions of fact upon whose existence or occurrence, ascertained from relevant data by a designated administrative agency, it directs that its statutory command shall be effective."

Section 5(b), as we have seen, does not lay down a "legislative policy," much less promulgate "a defined and binding rule of conduct." It does not condition the Secretary's authority upon the existence of "basic conditions of fact . . . ascertained from relevant data." Instead, it permits him to act upon a conclusory finding of an extravagantly vague political character that requires no factual support and is incapable of factual demonstration. Accordingly, the section is unconstitutional because "there is an absence of standards for the guidance of the [Secretary's] action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed" (*Yakus,* at 426).

C. The vice of the Act in delegating broad and undefined power to the Secretary is aggravated by what we have shown to be its denial to the persons affected of an opportunity for a hearing on, or judicial review of, his action. Brief for Appellee, 55-58. We there showed that in this aspect the Act violates procedural due process. But the lack of administrative and judicial safeguards against arbitrary action by the Secretary is also relevant in determining whether the authority delegated to him oversteps constitutional limitations.

Thus when the Court invalidated section 3 of the N.I.R.A. because the authority given the President to promulgate codes of fair competition was over-broad, it emphasized that the statute "does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure." *Schechter Corp. v. United States*, 295 U.S. 495, 541. In contrast, it pointed out that the authority of the Interstate Commerce Commission "can be exercised only upon findings based upon evidence" and that the standards of "public convenience, interest or necessity" of the Radio Act of 1927 "were to be enforced upon hearing and evidence" (*id.* at 540). The Court distinguished the Federal Trade Commission Act on similar grounds, stressing that it provides "for formal complaint, for notice and hearing, for appropriate findings of fact supported by adequate evidence, and for judicial review to give assurance that the action of the Commission is taken within statutory authority" (*id.* at 533). The N.I.R.A., on the other hand, "dispenses with this administrative procedure and with any administrative procedure of an analogous character" (*ibid.*). See also *Opp Cotton Mills v. Administrator*, 312 U.S. 126, 144.

D. The Court has warned that, "Precision of regulation must be the touchstone in an area . . . touching our most precious freedoms." *N.A.A.C.P. v. Button*, 371 U.S. 415, 438. Precision is likewise required of legislative delegations of authority to curtail these freedoms. As Justice Black has pointed out, "[The] cases show that when this Court con-

sidered that the legislative measures involved were of doubtful constitutionality substantively, it required explicit delegations of power." *Barenblatt v. United States,* 360 U.S. 109, 140 n. 7 (dissenting opinion).

This rule condemns section 5. For, as our initial brief showed, it is permeated with restraints on constitutionally protected freedoms. Under these circumstances, particularly, more is required of Congress than a vague and standardless delegation of authority to the Secretary to limit or eliminate, at his pleasure, the means by which Communists may seek a livelihood.

E. The government argues (Br. on Rearg. 9-12) that any insufficiency in the Act's original delegation of authority to the Secretary was cured by the enactment of the 1962 amendments to sections 3(7) and 5(b), eliminating the requirement for publication of a list of the "defense facilities" designated by the Secretary. The cure, it is said, was effected by the fact that the Secretary advised the Congressional committees considering the amendment that he had prepared a "tentative list" of his proposed designations and informed them of the four categories of activities which these designations included. The government cites *Zemel v. Rusk,* 381 U.S. 1, and *Hirabayashi v. United States,* 320 U.S. 81, as supporting the efficacy of this "cure."

We believe that the statute sustained in *Zemel* involves an invalid delegation of power for the reasons stated in the dissent of Justice Black. In any case, the decision is inapplicable. In the first place, the statute related to the conduct of foreign affairs where, as the Chief Justice emphasized (at 17), Congress "must of necessity paint with a broader brush than that it customarily wields in domestic areas."[4] Second, the Court found (at 17-18) that the stat-

[4] *Knauff v. Shaughnessy, supra,* relied on by the government (Br. on Rearg. 8-9), is similarly inapplicable since it involved a statute for the exclusion of aliens, a function which the Court found (at 542) "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation."

ute "took its content from history"—i.e., the "prior administrative practice" of the Department of State. Here, there was no prior administrative practice to give content to the statute, but only a "tentative" decision of the Secretary of Defense as to how he intended to administer it if the amendment was enacted.

The government's reliance on *Hirabayashi v. United States* is likewise misplaced. The Court sustained the statute there involved (at 92) only "as an emergency war measure" required at a time when an enemy invasion of the continental United States appeared imminent.[5] It is clear, moreover, that the Secretary does not regard his authority to designate "defense facilities" as circumscribed by the four categories of activities which were described to the Congressional committees. For the indictment does not allege that the Todd shipyard (where appellee is employed) is, or was found by the Secretary to be, within any of these categories. Nor is there anything in the Secretary's notification to Todd of its designation or in the notice of designation to Todd's employees (Apps. B and C to Brief for the United States, pp. 58-61) to indicate that such was, or was found by the Secretary to be, the fact.

II.

The proposition that section 5(a)(1)(D) violates substantive due process and the First Amendment has been further substantiated by the decision in Keyishian v. Board of Regents.

Our initial brief (pp. 13-37) showed that this case is controlled by the rule in *Aptheker v. Secretary of State*, 378 U.S. 500, and *Elfbrandt v. Russell*, 384 U.S. 11, which condemns section 5(a)(1)(D) as a violation of substantive due process and the First Amendment.

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[5] *Dakota Central Telephone Co. v. South Dakota*, 250 U.S. 163, also relied on by the government (Br. on Rearg. p. 8 n. 5) is likewise inapplicable as involving a war emergency measure.

Subsequent to the argument, the Court decided *Keyishian v. Board of Regents*, 285 U.S. 589, involving New York statutes whose effect was to make membership in the Communist Party with knowledge that the organization advocated the forcible overthrow of the government a disqualification for public employment. In invalidating these laws, the Court reaffirmed the principle of *Aptheker* and *Elfbrandt* which it capsulized in the statement (at 608) that, "legislation which sanctions membership unaccompanied by specific intent to further the unlawful goals of the organization or which is not active membership violates constitutional limitations."

Section 5(a)(1)(D) sanctions membership in a Communist-action organization without regard to the intent of the member and hence is invalid under this principle. The section has an additional infirmity since it sanctions membership unaccompanied even by knowledge of an unlawful organizational purpose. See Brief for Appellee, 13, 16. It therefore presents an aggravated case of what *Keyishian* characterized (at 609) as "impermissible 'overbreadth'" in attempting "to bar employment both for association which legitimately may be proscribed and for association which may not be proscribed consistently with First Amendment rights."

III.

The demonstration in appellee's initial brief that section 5(a)(1)(D), as applied, violates procedural due process and the prohibition against bills of attainder has been confirmed by the decision in Communist Party v. United States that the order requiring the Communist Party to register under the Act cannot constitutionally be enforced.

On March 3, 1967, some months after the present case was argued, the Court of Appeals for the District of Columbia reversed the second conviction of the Communist Party for refusing to comply with the order requiring it to register under the Act. *Communist Party v. United*

States, __ F.2d __. The ground for the decision (at 2[6]) was that the registration requirement is "hopelessly at odds" with the Fifth Amendment privilege against self-incrimination.[7] On April 3, 1967, the Department of Justice announced that it would not petition for certiorari, stating that, "This case is dead." New York Times, April 4, 1967.

These developments, which establish that the Communist Party cannot constitutionally be required to register under the Act, lend additional support to the demonstration in our initial brief (pp. 42-44, 52-54, 58-62) that, in two aspects, section 5(a)(1)(D), as applied, violates procedural due process and the prohibition against bills of attainder.

A. The invalidity of the section 2 findings concerning the world Communist movement.

The offense charged in the indictment (R. 1) is predicated on the existence of a final order requiring the Communist Party to register as a Communist-action organization. If the 1953 registration order against the Communist Party was invalid at the time of the alleged offense, appellee is not and cannot constitutionally be guilty. Brief for Appellee, 58. As we there showed, the validity of the order depended in turn upon the existence of a world Communist movement having the characteristics described in section 2 of the Act. We further showed (60-61) that, whatever may have been the case when the Act was passed, it is a matter of common knowledge that no such movement presently exists or existed at the time of the alleged offense.

Communist Party v. United States, supra, recognized as much (at 18, n. 11). After alluding to the section 2 finding of a monolithic world Communist movement controlled by an unnamed foreign power, the court observed:

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[6]Page references are to the slip opinion.

[7]The decision of the panel, composed of Judges Prettyman, Danaher and McGowan, was unanimous.

> "Although these words today may have an ironic ring in the ears of the foreign power in question, and in any event have not appeared to constitute the sole assumption upon which our foreign policy has been conceived and executed since they were placed on the statute books, we may assume that, as did the Supreme Court in *Communist Party*, they were true as of the time. Compare *Block v. Hirsh*, 256 U.S. 135 (1921) with *Chastleton Corporation v. Sinclair*, 264 U.S. 543 (1924), in which latter case Justice Holmes observed that, to the extent a Congressional declaration of fact looks to the future, 'it can be no more than a prophecy and is liable to be controlled by events.'"

The Act, as applied in the present case, insulates the validity of the section 2 findings from being "controlled by events." It does not permit appellee to litigate their current validity. Brief for Appellee, 61-62. Nor may the Communist Party do so unless it registers. *Id.* 44. But *Communist Party v. United States, supra*, establishes that the registration requirement is unconstitutional. Obviously, the vindication of appellee's constitutional rights cannot be made to depend on the willingness of others to surrender theirs.[8]

Hence, unless the Court is prepared to take judicial notice that events have invalidated the section 2 findings on which the entire Act rests, section 5(a)(1)(D), as applied, must be

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[8] The footnote to the government's Brief on Reargument (p. 2 n. 1) containing its only comment on the questions presented by appellee misrepresents the relevant provisions of the Act. It states that, "the Act gives the Party, or a registered member, the right to periodically contest the Board's determination and to obtain judicial review of that determination (Sections 13 and 14)." This is not true. Section 13(b) and (i) permits the Party to contest the current validity of the Board's determination only if it first registers under section 7. And the Act does not permit a member—whether registered or not—to contest the Board's determination with respect to the Party. Section 13(b) and (i) merely allows him, if registered, to seek cancelation of *his* registration by showing that he is not a member.

found to violate procedural due process and the prohibition against bills of attainder because the existence of the facts on which its constitutionality is predicated may not be challenged. See Brief for Appellee, 62.

B. The failure of the indictment to allege that the Communist Party is a Communist-action organization.

The indictment alleges only that the Communist Party has been ordered to register as, but not that it *is*, a Communist-action organization. This omission rests on the government's interpretation that section 5(a)(1)(D) makes the registration order conclusive and precludes appellee from contesting the current validity of the Board's determination with respect to the Party. Brief for Appellee 38. We have shown that the government's interpretation must be rejected because, among other reasons, the section as so interpreted would violate procedural due process and the prohibition against bills of attainder. Brief for Appellee 42-44, 53-54. We there pointed out that this would be the case even if the Communist Party had registered and was therefore in a position to seek a re-determination of its status by proceeding under section 13(b). *A fortiori*, the government's interpretation would render section 5(a)(1)(D) unconstitutional now that *Communist Party v. United States, supra*, has established that the Communist Party may not constitutionally be required to register.

CONCLUSION

The judgment below dismissing the indictment should be affirmed.

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SUPREME COURT OF THE UNITED STATES

No. 8.—October Term, 1967.

United States, Appellant, v. Eugene Frank Robel.	On Appeal From the United States District Court for the Western District of Washington.

[December 11, 1967.]

Mr. Chief Justice Warren delivered the opinion of the Court.

This appeal draws into question the constitutionality of § 5 (a)(1)(D) of the Subversive Activities Control Act of 1950, 50 U. S. C. § 784 (a)(1)(D),[1] which provides that, when a Communist-action organization [2] is under a final order to register, it shall be unlawful for any member of the organization "to engage in any employment

[1] The Act was passed over the veto of President Truman. In his veto message, President Truman told Congress, "The Department of Justice, the Department of Defense, the Central Intelligence Agency, and the Department of State have all advised me that the bill would seriously damage the security and the intelligence operations for which they are responsible. They have strongly expressed the hope that the bill would not become law." H. R. Doc. No. 708, 81st Cong., 2d Sess., 1 (1950).

President Truman also observed that "the language of the bill is so broad and vague that it might well result in penalizing the legitimate activities of people who are not Communists at all, but loyal citizens." *Id.*, at 3.

[2] Section 3 (3)(a) of the Act, 50 U. S. C. § 782 (3)(a), defines a "Communist-action organization" as:

"any organization in the United States (other than a diplomatic representative or mission of a foreign government accredited as such by the Department of State) which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement . . . and (ii) operated primarily to advance the objectives of such world Communist movement . . . ."

in any defense facility." In *Communist Party* v. *Subversive Activities Control Board*, 367 U. S. 1, this Court sustained an order of the SACB requiring the Communist Party of the United States to register as a Communist-action organization under the Act. The Board's order became final on October 20, 1961. At that time appellee, a member of the Communist Party, was employed as a machinist at the Seattle, Washington, shipyard of Todd Shipyards Corporation. On August 20, 1962, the Secretary of Defense, acting under authority delegated by § 5 (b) of the Act, designated that shipyard a "defense facility." Appellee's continued employment at the shipyard after that date subjected him to prosecution under § 5 (a)(1)(D), and on May 21, 1963, an indictment was filed charging him with a violation of that section. The indictment alleged in substance that appellee had "unlawfully and willfully engage[d] in employment" at the shipyard with knowledge of the outstanding order against the Party and with knowledge and notice of the shipyard's designation as a defense facility by the Secretary of Defense. The United States District Court for the Western District of Washington granted appellee's motion to dismiss the indictment on October 5, 1965. To overcome what it viewed as a "likely constitutional infirmity" in § 5 (a)(1)(D), the District Court read into that section "the requirement of active membership and specific intent." Because the indictment failed to allege that appellee's Communist Party membership was of that quality, the indictment was dismissed. The Government, unwilling to accept that narrow construction of § 5 (a)(1)(D) and insisting on the broadest possible application of the statute, initially took its appeal to the Court of Appeals for the Ninth Circuit.[3] On the Government's motion, the case

[3] The Government has persisted in this view in its arguments to this Court. Brief of the Government, pp. 48–56.

was certified here as properly a direct appeal to this Court under 18 U. S. C. § 3731. We noted probable jurisdiction. 384 U. S. 937.[4] We affirm the judgment of the District Court, but on the ground that § 5 (a) (1)(D) is an unconstitutional abridgment of the right of association protected by the First Amendment.[5]

We cannot agree with the District Court that § 5 (a) (1)(D) can be saved from constitutional infirmity by limiting its application to active members of Communist-action organizations who have the specific intent of furthering the unlawful goals of such organizations. The District Court relied on *Scales* v. *United States,* 367 U. S. 203, in placing its limiting construction on § 5 (a) (1)(D). It is true that in *Scales* we read the elements of active membership and specific intent into the membership clause of the Smith Act.[6] However, in *Aptheker* v. *Secretary of State,* 378 U. S. 500, we noted that the Smith Act's membership clause required a defendant to have knowledge of the organization's illegal advocacy, a requirement that "was intimately connected with the construction limiting membership to 'active' members."

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[4] We initially heard oral argument in this case on November 14, 1966. On June 5, 1967, we entered the following order:

"This case is restored to the calendar for reargument and counsel are directed to brief and argue, in addition to the questions presented, the question whether the delegation of authority to the Secretary of Defense to designate 'defense facilities' satisfies pertinent constitutional standards."

We heard additional arguments on October 9, 1967.

[5] In addition to arguing that § 5 (a)(1)(D) is invalid under the First Amendment, appellee asserted the statute was also unconstitutional because (1) it offended substantive and procedural due process under the Fifth Amendment; (2) it contained an unconstitutional delegation of legislative power to the Secretary of Defense; and (3) it is a bill of attainder. Because we agree that the statute is contrary to the First Amendment, we find it unnecessary to consider the other constitutional arguments.

[6] 18 U. S. C. § 2385.

Id., at 511, n. 9. *Aptheker* involved a challenge to § 6 of the Subversive Activities Control Act, which provides that, when a Communist organization is registered or under a final order to register, it shall be unlawful for any member thereof with knowledge or notice thereof to apply for a passport. We held that "[t]he clarity and preciseness of the provision in question make it impossible to narrow its indiscriminate cast and overly broad scope without substantial rewriting." *Id.*, at 515. We take the same view of § 5 (a)(1)(D). It is precisely because that statute sweeps indiscriminately across all types of associations with Communist-action groups, without regard to the quality and degree of membership, that it runs afoul of the First Amendment.

In *Aptheker*, we held § 6 unconstitutional because it too broadly and indiscriminately infringed upon constitutionally protected rights. The Government has argued that, despite the overbreadth which is obvious on the face of § 5 (a)(1)(D), *Aptheker* is not controlling in this case because the right to travel is a more basic freedom than the right to be employed in a defense facility. We agree *Aptheker* is not controlling since it was decided under the Fifth Amendment. But we cannot agree with the Government's characterization of the essential issue in this case. It is true that the specific disability imposed by § 5 (a)(1)(D) is to limit the employment opportunities of those who fall within its coverage, and such a limitation is not without serious constitutional implications. See *Greene* v. *McElroy*, 360 U. S. 474, 492. But the operative fact upon which the job disability depends is the exercise of an individual's right of association, which is protected by the provisions of the First Amendment.[7] Wherever one would place the right to

[7] Our decisions leave little doubt that the right of association is specifically protected by the First Amendment. *E. g.*, *Aptheker* v. *Secretary of State*, *supra*, at 507; *Gibson* v. *Florida Legislative*

travel on a scale of constitutional values, it is clear that those rights protected by the First Amendment are no less basic in our democratic scheme.

The Government seeks to defend the statute on the ground that it was passed pursuant to Congress' war power. The Government argues that this Court has given broad deference to the exercise of that constitutional power by the national legislature. That argument finds support in a number of decisions of this Court.[8] However, the phrase "war power" cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit. "[E]ven the war power does not remove constitutional limitations safeguarding essential liberties." *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 426. More specifically in this case, the Government asserts that § 5 (a)(1)(D) is an "expression of the growing concern shown by the executive and legislative branches of government over the risks of internal subversion in plants on which the national defense depend[s]."[9] Yet, this concept of "national defense" cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term "national defense" is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the

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Investigation Committee, 372 U. S. 539, 543; *Bates* v. *City of Little Rock*, 361 U. S. 516, 522–523; *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 460. See generally Emerson, Freedom of Association and Freedom of Expression, 74 Yale L. J. 1 (1964).

[8] See, *e. g.*, *Lichter* v. *United States*, 334 U. S. 742, 754–772; *Hirabayashi* v. *United States*, 320 U. S. 81, 93.

[9] Brief for the Government, p. 15.

subversion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile.

When Congress' exercise of one of its enumerated powers clashes with those individual liberties protected by the Bill of Rights, it is our "delicate and difficult task" to determine whether the resulting restriction on freedom can be tolerated. See *Schneider* v. *State*, 308 U. S. 147, 161. The Government emphasizes that the purpose of §5 (a)(1)(D) is to reduce the threat of sabotage and espionage in the Nation's defense plants. The Government's interest in such a prophylactic measure is not insubstantial. But it cannot be doubted that the means chosen to implement that governmental purpose in this instance cuts deeply into the right of association. Section 5 (a)(1)(D) put appellee to the choice of surrendering his organizational affiliation, regardless of whether his membership threatened the security of a defense facility,[10] or giving up his job.[11] When appellee refused to make that choice, he became subject to a possible criminal penalty of five years' imprisonment and a $10,000 fine.[12] The statute quite literally establishes guilt by association alone, without any need to establish

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[10] The appellee has worked at the shipyard, apparently without incident and apparently without concealing his Communist Party membership, for more than 10 years. And we are told that, following appellee's indictment and arrest, "he was released on his own recognizance and immediately returned to his job as a machinist at the Todd Shipyards, where he has worked ever since." Brief for Appellee, p. 6, n. 8. As far as we can determine, appellee is the only individual the Government has attempted to prosecute under §5 (a)(1)(D).

[11] We recognized in *Greene* v. *McElroy*, 360 U. S., at 492, that "the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment."

[12] 50 U. S. C. § 794 (c).

that an individual's association poses the threat feared by the Government in proscribing it.[13] The inhibiting effect on the exercise of First Amendment rights is clear.

It has become axiomatic that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP* v. *Button*, 371 U. S. 415, 438; see *Aptheker* v. *Secretary of State*, 378 U. S. 500, 512–513; *Shelton* v. *Tucker*, 364 U. S. 479, 488. Such precision is notably lacking in § 5 (a)(1)(D). That statute casts its net across a broad range of associational activities, indiscriminately trapping membership which can be constitutionally punished[14] and membership which cannot be so proscribed.[15] It is made irrelevant to the statute's operation that an individual may be a passive or inactive member of a designated organization, that he may be unaware of the organization's unlawful aims, or that he may disagree with those unlawful aims.[16] It is also made irrelevant that an individual who is subject to the penalties of § 5 (a)(1)(D) may occupy a nonsensitive position in a defense facility.[17]

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[13] The Government has insisted that Congress, in enacting § 5 (a)(1)(D), has not sought "to punish membership in 'Communist-action' . . . organizations." Brief for the Government, p. 53. Rather, the Government asserts, Congress has simply sought to regulate access to employment in defense facilities. But it is clear the employment disability is imposed only because of such membership.

[14] See *Scales* v. *United States*, 367 U. S. 203.

[15] See *Elfbrandt* v. *Russell*, 384 U. S. 11.

[16] A number of complex motivations may impel an individual to align himself with a particular organization. See *Gibson* v. *Florida Legislative Investigation Committee*, 372 U. S. 539, 562–565 (concurring opinion). It is for that reason that the mere presence of an individual's name on an organization's membership rolls is insufficient to impute to him the organization's illegal goals.

[17] See *Cole* v. *Young*, 351 U. S. 536, 546: "[I]t is difficult to justify summary suspensions and nonreviewable dismissals on loyalty grounds of employees who are not in 'sensitive' positions and who are thus not situationed where they could bring about any discernible adverse effects on the Nation's security."

Thus, § 5 (a)(1)(D) contains the fatal defect of overbreadth because it seeks to bar employment both for association which may be proscribed and for association which may not be proscribed consistently with First Amendment rights. See *Elfbrandt* v. *Russell*, 384 U. S. 11; *Aptheker* v. *Secretary of State*, *supra*; *NAACP* v. *Alabama ex rel. Flowers*, 377 U. S. 288; *NAACP* v. *Button*, *supra*. This the Constitution will not tolerate.

We are not unmindful of the congressional concern over the danger of sabotage and espionage in national defense industries, and nothing we hold today should be read to deny Congress the power under narrowly drawn legislation to keep from sensitive positions in defense facilities those who would use their positions to disrupt the Nation's production facilities. We have recognized that, while the Constitution protects against invasions of individual rights, it does not withdraw from the Government the power to safeguard its vital interests. *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 160. Spies and saboteurs do exist, and Congress can, of course, prescribe criminal penalties for those who engage in espionage and sabotage.[18] The Government can deny access to its secrets to those who would use such information to harm the Nation.[19] And Congress can declare sensitive positions in national defense industries off limits to those who would use such positions to disrupt the production of defense materials. The Government has told us that Congress, in passing § 5 (a)(1)(D), made a considered

[18] Congress has already provided stiff penalties for those who conduct espionage and sabotage against the United States. 18 U. S. C. §§ 792–798 (espionage); §§ 2151–2156 (sabotage).

[19] The Department of Defense, pursuant to Executive Order 10865, as amended by Executive Order 10909, has established detailed procedures for screening those working in private industry who, because of their jobs, must have access to classified defense information. 32 C. F. R. Part 155. The provisions of those regulations are not before the Court in this case.

judgment that one possible alternative to that statute—an industrial security screening program—would be inadequate and ineffective to protect against sabotage in defense facilities. It is not our function to examine the validity of that congressional judgment. Neither is it our function to determine whether an industrial security screening program exhausts the possible alternatives to the statute under review. We are concerned solely with determining whether the statute before us has exceeded the bounds imposed by the Constitution when First Amendment rights are at stake. The task of writing legislation which will stay within those bounds has been committed to Congress. Our decision today simply recognizes that, when legitimate legislative concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal by means which have a "less drastic" impact on the continued vitality of First Amendment freedoms.[20] *Shelton* v. *Tucker, supra;* cf.

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[20] It has been suggested that this case should be decided by "balancing" the governmental interests expressed in § 5 (a) (1) (D) against the First Amendment rights asserted by the appellee. This we decline to do. We recognize that both interests are substantial, but we deem it inappropriate for this Court to label one as being more important or more substantial than the other. Our inquiry is more circumscribed. Faced with a clear conflict between a federal statute enacted in the interests of national security and an individual's exercise of his First Amendment rights, we have confined our analysis to whether Congress has adopted a constitutional means in achieving its concededly legitimate legislative goal. In making this determination we have found it necessary to measure the validity of the means adopted by Congress against both the goal it has sought to achieve and the specific prohibitions of the First Amendment. But we have in no way "balanced" those respective interests. We have ruled only that the Constitution requires that the conflict between congressional power and individual rights be accommodated by legislation drawn more narrowly to avoid the conflict. There is, of course, nothing novel in that analysis. Such

United States v. *Brown*, 381 U. S. 437, 461. The Constitution and the basic position of First Amendment rights in our democratic fabric demand nothing less.

Affirmed.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

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a course of adjudication was enunciated by Chief Justice Marshall when he declared: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, *which are not prohibited, but which consist with the letter and spirit of the constitution*, are constitutional." *M'Culloch* v. *Maryland*, 4 Wheat. 316, 421 (emphasis added). In this case, the means chosen by Congress are contrary to the "letter and spirit" of the First Amendment.

SUPREME COURT OF THE UNITED STATES

No. 8.—October Term, 1967.

United States, Appellant, v. Eugene Frank Robel. } On Appeal From the United States District Court for the Western District of Washington.

[December 11, 1967.]

Mr. Justice Brennan, concurring in the result.

I too agree that the judgment of the District Court should be affirmed but I reach that result for different reasons.

Like the Court, I disagree with the District Court that § 5 (a)(1)(D) can be read to apply only to active members who have the specific intent to further the Party's unlawful objectives. In *Aptheker* v. *Secretary of State*, 378 U. S. 500, we rejected that reading of § 6 of the Act which provides that, when a Communist organization is registered or under final order to register, it shall be unlawful for any member thereof with knowledge or notice of the order to apply for or use a passport. We held that "[t]he clarity and preciseness of the provision in question make it impossible to narrow its indiscriminately cast and overly broad scope without substantial rewriting." 378 U. S., at 515. I take the same view of § 5 (a)(1)(D).

Aptheker held § 6 of the Act overbroad in that it deprived Party members of the right to travel without regard to whether they were active members of the Party or intended to further the Party's unlawful objectives, and therefore invalidly abridged, on the basis of political associations, the members' constitutionally protected right to travel. Section 5 (a)(1)(D) also treats as irrelevant whether or not the members are active, or know the Party's unlawful purposes, or intend to pursue those

purposes. Compare *Keyishian* v. *Board of Regents*, 385 U. S. 589; *Elfbrandt* v. *Russell*, 384 U. S. 11, 17; *Scales* v. *United States*, 367 U. S. 203; *Schneiderman* v. *United States*, 320 U. S. 118, 136. Indeed, a member such as appellee, who has worked at the Todd Shipyards without complaint or known ground for suspicion for over 10 years, is afforded no opportunity to prove that the statute's presumption that he is a security risk is invalid as applied to him. And no importance whatever is attached to the sensitivity of the jobs held by Party members, a factor long considered relevant in security cases.[1] Furthermore, like § 6, § 5 (a)(1)(D) affects constitutionally protected rights. "[T]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment. . . ." *Greene* v. *McElroy*, 360 U. S. 474, 492. That right is therefore also included among the "[i]ndividual liberties fundamental to American institutions [which] are not to be destroyed under pretext of preserving those institutions, even from the gravest external dangers." *Communist Party* v. *SACB*, 367 U. S. 1, 96. Since employment opportunities are denied by § 5 (a)(1)(D) simply on the basis of political associations the statute also has the potential of curtailing free expression by inhibiting persons from establishing or retaining such associations. See *Wieman* v. *Updegraff*, 344 U. S. 183, 191. "Broad prophylactic rules in the area of free expression are suspect . . . . Precision of regulation must be the touchstone in . . . area[s] so closely touching our most precious freedoms." *NAACP* v. *Button*, 371 U. S.

[1] See *Cole* v. *Young*, 351 U. S. 536, 546:

"[I]t is difficult to justify summary suspensions and unreviewable dismissals on loyalty grounds of employees who are not in 'sensitive' positions and who are thus not situated where they could bring about any discernible adverse effects on the Nation's security."

415, 438; see *Shelton* v. *Tucker*, 364 U. S. 479; 488; *Cantwell* v. *Connecticut*, 310 U. S. 296, 304.

It is true, however, as the Government points out, that Congress often regulates indiscriminately, through preventive or prophylactic measures, *e. g.*, *Board of Governors* v. *Agnew*, 329 U. S. 441; *North American Co.* v. *S. E. C.*, 327 U. S. 686, and that such regulation has been upheld even where fundamental freedoms are potentially affected, *Hirabayashi* v. *United States*, 320 U. S. 81; *Cafeteria Workers* v. *McElroy*, 367 U. S. 886; *Carlson* v. *Landon*, 342 U. S. 524. Each regulation must be examined in terms of its potential impact upon fundamental rights, the importance of the end sought and the necessity for the means adopted. The Government argues that § 5 (a)(1)(D) may be distinguished from § 6 on the basis of these factors. Section 5 (a)(1)(D) limits employment only in "any defense facility," while § 6 deprived every Party member of the right to apply for or to hold a passport. If § 5 (a)(1)(D) were in fact narrowly applied, the restrictions it would place upon employment are not as great as those placed upon the right to travel by § 6.[2] The problems presented by the

[2] The Government also points out that § 5 (a)(1)(D) applies only to members of "Communist-action" organizations, while § 6 applied also to members of "Communist-front" organizations, groups which the Government contends are less dangerous to the national security under Congress' definitions, and whose members are therefore presumably less dangerous. This distinction is, however, open to some doubt. Even if a "front" organization, which is defined as an organization either dominated by or primarily operated for the purpose of aiding and supporting "action" organizations, could in some fashion be regarded as less dangerous, *Aptheker* held § 6 invalid because it failed to discriminate among affected persons on the bases of their activity and commitment to unlawful purposes, and nothing in the opinion indicates the result would have been different if Congress had been indiscriminate in these respects with regard only to "Communist-action" group members.

employment of Party members at defense facilities, moreover, may well involve greater hazards to national security than those created by allowing Party members to travel abroad. We may assume, too, that Congress may have been justified in its conclusion that alternatives to § 5 (a)(1)(D) were inadequate.[3] For these reasons, I am not persuaded to the Court's view that overbreadth is fatal to this statute, as I agreed it was in other contexts; see, *e. g.*, *Keyishian* v. *Board of Regents*, 385 U. S. 589; *Elfbrandt* v. *Russell*, 384 U. S. 11; *Aptheker* v. *Secretary of State*, 378 U. S. 500; *NAACP* v. *Button*, 371 U. S. 415.

However, acceptance of the validity of these distinctions and recognition of congressional power to utilize a prophylactic device such as § 5 (a)(1)(D) to safeguard against espionage and sabotage at essential defense facilities, would not end inquiry in this case. Even if the statute is not overbroad on its face—because there may be "defense facilities" so essential to our national

[3] The choice of a prophylactic measure "must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton* v. *Tucker*, 364 U. S. 479, 488. Since I would affirm on another ground, however, I put aside the question whether existing security programs were inadequate to prevent serious, possibly catastrophic consequences.

Congress rejected suggestions of the President and the Department of Justice that existing security programs were adequate with only slight modifications. See H. R. Doc. No. 679, 81st Cong., 2d Sess., 5 (1950); Hearings on Legislation to Outlaw Certain Un-American and Subversive Activities before the House Un-American Activities Committee, 81st Cong., 2d Sess., 2122–2125 (1950). Those programs cover most of the facilities within the reach of § 5 (a)(1)(D) and make Party membership an important factor governing access. 32 CFR § 155.5. They provide measures to prevent and punish subversive acts. The Department of Defense, moreover, had screened some 3,000,000 defense contractor employees under these procedures by 1956, Brown, Loyalty and Security 179–180 (1958), thereby providing at least some evidence of its capacity to handle this problem in a more discriminating manner.

security that Congress could constitutionally exclude all Party members from employment in them—the congressional delegation of authority to the Secretary of Defense to designate "defense facilities" creates the danger of overbroad, unauthorized, and arbitrary application of criminal sanctions in an area of protected freedoms and therefore, in my view, renders this statute invalid. Because the statute contains no meaningful standard by which the Secretary is to govern his designations, and no procedures to contest or review his designations, the "defense facility" formulation is constitutionally insufficient to mark "the field within which the [Secretary] is to act so that it may be known whether he has kept within it in compliance with the legislative will." *Yakus* v. *United States*, 321 U. S. 414, 425.

The Secretary's role in designating "defense facilities" is fundamental to the potential breadth of the statute, since the greater the number and types of facilities designated, the greater is the indiscriminate denial of job opportunities, under threat of criminal punishment, to Party members because of their political associations. A clear, manageable standard might have been a significant limitation upon the Secretary's discretion. But the standard under which Congress delegated the designating power is so indefinite as to be meaningless. The statute defines "facility" broadly enough to include virtually every place of employment in the United States; the term includes "any plant, factory or other manufacturing, producing or servicing establishment, airport, airport facility, vessel, pier, waterfront-facility, mine, railroad, public utility, laboratory, station, or other establishment or facility, or any part, division or department of any of the foregoing." And § 5 (b) grants the Secretary of Defense untrammelled discretion to designate as a "defense facility" any facility "with respect to the operation of which he finds and de-

termines that the security of the United States requires . . ." that Party members should not be employed there. Congress could easily have been more specific.[4] Instead, Congress left the Secretary completely at large in determining the relevance and weight to be accorded such factors as the importance and secrecy of the facility and of the work being done there, and the indispensability of the facility's service or product to the national security.

Congress ordinarily may delegate power under broad standards. *E. g., Dakota Central Tel. Co.* v. *South Dakota,* 250 U. S. 163, 183; *FPC* v. *Hope Natural Gas Co.,* 320 U. S. 591; *NBC* v. *United States,* 319 U. S. 190. No other general rule would be feasible or desirable. Delegation of power under general directives is an inevitable consequence of our complex society, with its myriad, ever changing, highly technical problems. "The

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[4] Congress, in fact, originally proposed to limit the Secretary's discretion in designating "defense facilities." H. R. 9490, passed by both the House and Senate, provided that the Secretary should determine and designate each "defense plant" as defined in § 3 (7) of the Act. The difference between that version and § 5 (a) (1) (D) adopted at conference is commented upon in Conf. Rep. No. 3112, 81st Cong., 2d Sess., 50 (1950):

"Under section 3 (7) a defense plant was defined as any plant, factory, or other manufacturing or service establishment, or any part thereof, engaged in the production or furnishing, for the use of the Government of any commodity or service determined and designated by the Secretary of Defense to be of such character as to affect the military security of the United States.

"Section 3 (7), and the provisions of section 5 relating to the designation of defense plants by the Secretary of Defense, have been modified in the conference substitute so as to broaden the concept of defense plants to cover any appropriately designated plant, factory or other manufacturing, producing, or service establishment, airport, airport facility, vessel, pier, water-front facility, mine, railroad, public utility, laboratory, station, or other establishment or facility, or any part, division, or department of any of the foregoing. Because of this broader coverage, section 3 (7) has been changed so as to define the two terms 'facility' and 'defense facility.'"

Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality . . . to perform its function. . . ." *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 421; *Currin* v. *Wallace*, 306 U. S. 1, 15. It is generally enough that, in conferring power upon an appropriate authority, Congress indicate its general policy, and act in terms or within a context which limits the power conferred. See, *e. g.*, *Arizona* v. *California*, 373 U. S. 546, 584–585; *FCC* v. *RCA Communications, Inc.*, 346 U. S. 86; *Lichter* v. *United States*, 334 U. S. 742; *Yakus* v. *United States*, *supra*, 321 U. S., at 424; *Bandini Petroleum Co.* v. *Superior Court*, 284 U. S. 8; *FTC* v. *Gratz*, 253 U. S. 421; *Buttfield* v. *Stranahan*, 192 U. S. 470. Given such a situation, it is possible for affected persons, within the procedural structure usually established for the purpose, to be heard by the implementing agency and to secure meaningful review of its action in the courts, and for Congress itself to review its agent's action to correct significant departures from Congress' intention.

The area of permissible indefiniteness narrows, however, when the regulation invokes criminal sanctions and potentially affects fundamental rights, as does § 5 (a)(1)(D). See *Barenblatt* v. *United States*, 360 U. S. 109, 140, n. 7 (dissenting opinion, BLACK, J.). This is because the numerous deficiencies connected with vague legislative directives, whether to a legislative committee, *United States* v. *Rumely*, 345 U. S. 41, to an executive officer, *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, to a judge and jury, *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 465, or to private persons, *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, see *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, are far more serious when liberty and the exercise of fundamental rights are at stake. See also *Gojack* v. *United States*, 384 U. S. 702; *Kunz* v. *New York*, 340 U. S. 290;

Winters v. *New York*, 333 U. S. 507; *Thornhill* v. *Alabama*, 310 U. S. 88; *Hague* v. *C. I. O.*, 307 U. S. 496; *Herndon* v. *Lowry*, 301 U. S. 242.

First. The failure to provide adequate standards in § 5 (a)(1)(D) reflects Congress' failure to have made a "legislative judgment," *Cantwell* v. *Connecticut*, *supra*, 310 U. S., at 307, on the extent to which the prophylactic measure should be applied. Formulation of policy is a legislature's primary responsibility, entrusted to it by the electorate, and to the extent Congress delegates authority under indefinite standards, this policy-making function is passed on to other agencies, often not answerable or responsive in the same degree to the people. "[S]tandards of permissible statutory vagueness are strict . . ." in protected areas. *NAACP* v. *Button*, *supra*, 371 U. S., at 432. "Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them." *Greene* v. *McElroy*, 360 U. S. 474, 507.

Congress has the resources and the power to inform itself, and is the appropriate forum where the conflicting pros and cons should have been presented and considered. But instead of a determination by Congress reflected in guiding standards of the types of facilities to which § 5 (a)(1)(D) should be applied, the statute provides for a resolution by the Secretary of Defense acting on his own accord. It is true that the Secretary presumably has at his disposal the information and expertise necessary to make reasoned judgments on which facilities are important to national security. But that is not the question to be resolved under this statute. Compare *Hague* v. *CIO*, 307 U. S. 496. Rather, the Secretary is in effect determining which facilities are so important to the national security that Party members, active or inactive, well-intentioned

or ill, should be prohibited from working within them in any capacity, sensitive or innocuous, under threat of criminal prosecution. In resolving this conflict of interests, the Secretary's judgment, colored by his overriding obligation to protect the national defense, is not a constitutionally acceptable substitute for Congress' judgment, in the absence of further, limiting guidance.[5]

The need for a legislative judgment is especially acute here, since it is imperative when liberty and the exercise of fundamental freedoms are involved that constitutional rights not be unduly infringed. *Cantwell* v. *Connecticut*, *supra*, 310 U. S., at 304. Before we can decide whether it is an undue infringement of protected rights to send a person to prison for holding employment at a certain type facility, it ought at least to appear that Congress authorized the proscription as warranted and necessary. Such congressional determinations will not be assumed. "They must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized . . . but also because explicit action, especially in areas of doubt-

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[5] The Secretary has published criteria which guide him in applying the statute:

"The list of 'defense facilities' is comprised of (1) facilities engaged in important classified military projects; (2) facilities producing important weapons systems, subassemblies and their components; (3) facilities producing essential common components, intermediates, basic materials and raw materials; (4) important utility and service facilities; and (5) research laboratories whose contributions are important to the national defense. The list, which will be amended from time to time as necessary, has been classified for reasons of security."

Department of Defense Release No. 1363–62, Aug. 20, 1962. These broad standards, which might easily justify applying the statute to most of our major industries, cannot be read into the statute to limit the Secretary's discretion, since they are subject to unreviewable amendment.

ful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws." *Greene* v. *McElroy*, *supra*, 360 U. S., at 507.

Second. We said in *Watkins* v. *United States*, 354 U. S. 178, 205, that Congress must take steps to assure "respect for constitutional liberties" by preventing the existence of "a wide gulf between the responsibility for the use of . . . power and the actual exercise of that power." Procedural protections to avoid that gulf have been recognized as essential when fundamental freedoms are regulated, *Speiser* v. *Randall*, 357 U. S. 513; *Marcus* v. *Search Warrant*, 367 U. S. 717, 730; *A Quantity of Copies of Books* v. *Kansas*, 378 U. S. 205, 213, even when Congress acts pursuant to its "great powers," *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 164. Without procedural safeguards, regulatory schemes will tend through their indiscriminate application to inhibit the activity involved. See *Marcus* v. *Search Warrant*, *supra*, 367 U. S., at 734–735.

It is true that "[a] construction of the statute which would deny all opportunity for judicial determination of an asserted constitutional right is not to be favored." *Lockerty* v. *Phillips*, 319 U. S. 182, 188. However, the text and history of this section compels the conclusion that Congress deliberately chose not to provide for protest either to the Secretary or the courts from any designation by the Secretary of a facility as a "defense facility." The absence of any provision in this regard contrasts strongly with the care that Congress took to provide for the determination by the SACB that the Party is a Communist-action organization, and for judicial review of that determination. The Act "requires the registration only of organizations which . . . are found to be under the direction, domination, or control of certain foreign powers and to operate primarily to

advance certain objectives. This finding must be made after full administrative hearing, subject to judicial review which opens the record for the reviewing court's determination whether the administrative findings as to fact are supported by the preponderance of the evidence." *Communist Party* v. *SACB, supra,* 367 U. S., at 86–87. In contrast, the Act nowhere provides for an administrative hearing on the Secretary's designation, either public or private, nor is his finding subject to review. A Party member charged with notice of the designation must quit the Party or his job; he cannot contest the Secretary's action on trial if he retains both and is prosecuted.[6]

This is persuasive evidence that the matter of the designation of "defense facilities" was purposely committed by Congress entirely to the discretionary judgment of the Secretary. Unlike the opportunities for hearing and judicial review afforded the Party itself, the Party member was not to be heard by the Secretary to protest the designation of his place of employment as a "defense facility," nor was the member to have recourse to the courts. This pointed distinction, as in the case of the statute before the Court in *Schilling* v. *Rogers,*

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[6] The statute contemplates only four significant findings before criminal liability attaches: (1) that the Communist Party is a "Communist-action organization"; (2) that defendant is a member of the Communist Party; (3) that defendant engaged in employment at a "defense facility"; and (4) that he had notice that his place of employment was a "defense facility." The first finding was made by the Subversive Activities Control Board. The third finding—that the shipyard is a "defense facility"—was made by the Secretary of Defense. The fourth finding refers to the notice requirement which is no more than a presumption from the posting required of the employer by § 5 (b). Thus the only issue which a defendant can effectively contest is whether he is a Communist Party member. In view of the result which I would reach, however, I need not consider appellee's argument that this affords defendants only the shadow of a trial, and violates due process.

363 U. S. 666, 674, is compelling evidence "that in this Act Congress was advertent to the role of the courts, and an absence in any specific area of any kind of provision for judicial participation strongly indicates a legislative purpose that there be no such participation." This clear indication of the congressional plan, coupled with a flexibility—as regards the boundaries of the Secretary's discretion—so unguided as to be entirely unguiding, must also mean that Congress contemplated that an affected Party member was not to be heard to contend even at his criminal trial that the Secretary acted beyond the scope of his powers, or that the designation of the particular facility was arbitrary and capricious. Cf. *Estep* v. *United States*, 327 U. S. 114.

The legislative history of the section confirms this conclusion. That history makes clear that Congress was concerned that neither the Secretary's reasons for a designation nor the fact of the designation should be publicized. This emerged after President Truman vetoed the statute. In its original form the Act required the Secretary to "designate and proclaim, and from time to time revise, a list of facilities . . . to be promptly published in the Federal Register . . . ." § 5 (6). The President commented in his veto message, "[s]pies and saboteurs would willingly spend years of effort seeking to find out the information that this bill would require the Government to hand them on a silver platter." H. R. Doc. No. 708, 81st Cong., 2d Sess., 2 (1950). Shortly after this Court sustained the registration provisions of the Act in *SACB* v. *Communist Party, supra*, the Act was amended at the request of the Secretary to eliminate the requirement that the list of designated facilities be published in the Federal Register. 76 Stat. 91. Instead, the list is classified information. Whether or not such classification is practically meaningful—in light of the fact that notice of a designation must be posted in

the designated facility—the history is persuasive against any congressional intention to provide for hearings or judicial review that might be attended with undesired publicity. We are therefore not free to imply limitations upon the Secretary's discretion or procedural safeguards that Congress obviously chose to omit. Compare *Cole* v. *Young*, 351 U. S. 536; *United States* v. *Rumely*, *supra*; *Ex parte Endo*, 323 U. S. 283, 299; *Japanese Immigrant Case*, 189 U. S. 86, 101; see *Green* v. *McElroy*, *supra*, 360 U. S., at 507.

Third. The indefiniteness of the delegation in this case also results in inadequate notice to affected persons. Although the form of notice provided for in § 5 (b) affords affected persons reasonable opportunity to conform their behavior to avoid punishment, it is not enough that persons engaged in arguably protected activity be reasonably well advised that their actions are subject to regulation. Persons so engaged must not be compelled to conform their behavior to commands, no matter how unambiguous, from delegated agents whose authority to issue the commands is unclear. *Marcus* v. *Search Warrant*, *supra*, 367 U. S., at 736. The legislative directive must delineate the scope of the agent's authority so that those affected by the agent's commands may know that his command is within his authority and is not his own arbitrary fiat. *Cramp* v. *Board of Public Instruction*, 368 U. S. 278; *Scull* v. *Virginia*, 359 U. S. 344; *Watkins* v. *United States*, *supra*, 354 U. S., at 208–209. There is no way for persons affected by § 5 (a)(1)(D) to know whether the Secretary is acting within his authority, and therefore no fair basis upon which they may determine whether or not to risk disobedience in the exercise of activities normally protected.

Section 5 (a)(1)(D) denies significant employment rights under threat of criminal punishment to persons simply because of their political associations. The Gov-

ernment makes no claim that Robel is a security risk. He has worked as a machinist at the shipyards for many years, and we are told is working there now. We are in effect invited by the Government to assume that Robel is a law abiding citizen, earning a living at his chosen trade. The justification urged for punishing him is that Congress may properly conclude that members of the Communist Party, even though nominal or inactive members and believing only in change through lawful means, are more likely than other citizens to engage in acts of espionage and sabotage harmful to our national security. This may be so. But in areas of protected freedoms, regulation based upon mere association and not upon proof of misconduct or even of intention to act unlawfully, must at least be accompanied by standards or procedural protections sufficient to safeguard against indiscriminate application. "If . . . 'liberty' is to be regulated, it must be pursuant to the law-making functions of Congress . . . [a]nd if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests." *Kent* v. *Dulles*, 357 U. S. 116, 129.

SUPREME COURT OF THE UNITED STATES

No. 8.—October Term, 1967.

United States, Appellant, *v.* Eugene Frank Robel.	On Appeal From the United States District Court for the Western District of Washington.

[December 11, 1967.]

Mr. Justice White, with whom Mr. Justice Harlan joins, dissenting.

The Court holds that because of the First Amendment a member of the Communist Party who knows that the Party has been held to be a Communist-action organization may not be barred from employment in defense establishments important to the security of the Nation. It therefore refuses to enforce the contrary judgments of the Legislative and Executive Branches of the Government. Respectfully disagreeing with this view, I dissent.

The constitutional right found to override the public interest in national security defined by Congress is the right of association, here the right of respondent Robel to remain a member of the Communist Party after being notified of its adjudication as a Communist-action organization. Nothing in the Constitution requires this result. The right of association is not mentioned in the Constitution. It is a judicial construct appended to the First Amendment rights to speak freely, to asemble, and to petition for redress of grievances.[1] While the right of

[1] If men may speak as individuals, they may speak in groups as well. If they may assemble and petition, they must have the right to associate to some extent. In this sense the right of association simply extends constitutional protection to First Amendment rights when exercised with others rather than by an individual alone. In *NAACP* v. *Alabama*, the Court said that the freedom to associate for the advancement of beliefs and ideas is constitutionally protected and that it is "immaterial whether the beliefs sought to be advanced

association has deep roots in history and is supported by the inescapable necessity for group action in a republic as large and complex as ours, it has only recently blossomed as the controlling factor in constitutional litigation; its contours as yet lack delineation. Although official interference with First Amendment rights has drawn close scrutiny, it is now apparent that the right of association is not absolute and is subject to significant regulation by the State. The law of criminal conspiracy restricts the purposes for which men may associate and the means they may use to implement their plans. Labor unions, and membership in them, are intricately controlled by statutes, both federal and state, as are political parties and corporations.

The relevant cases uniformly reveal the necessity for accommodating the right of association and the public interest. *NAACP* v. *Alabama*, 357 U. S. 449 (1958),

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by association pertain to political, economic, religious or cultural matters . . . ." 357 U. S. 449, 460 (1958). That case involved the propagation of ideas by a group as well as litigation as a form of petition. The latter First Amendment element was also involved in *NAACP* v. *Button*, 371 U. S. 415 (1963); *Railroad Trainmen* v. *Virginia Bar*, 377 U. S. 1 (1964); and *United Mine Workers* v. *Illinois Bar Assn.*, *ante*, p. —. The activities in *Eastern R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127 (1961), although commercially motivated, were aimed at influencing legislative action. Whether the right to associate is an independent First Amendment right carrying its own credentials and will be carried beyond the implementation of other First Amendment rights awaits a definitive answer. In this connection it should be noted that the Court recently dismissed, as not presenting a substantial federal question, an appeal challenging Florida regulations which forbid a Florida accountant from associating in his work, whether as partner or employee, with any nonresident accountant; out-of-state associations are barred from the State unless every partner is a qualified Florida accountant, and in practice only Florida residents can become qualified there. *Mercer* v. *Hemmings*, 36 U. S. L. Week 3167 (Oct. 23, 1967).

which contained the first substantial discussion of the right in an opinion of this Court, exemplifies the judicial approach. There, after noting the impact of official action on the right to associate, the Court inquired "whether Alabama has demonstrated an interest in obtaining the disclosures it seeks from petitioner which is sufficient to justify the deterrent effect which we have concluded these disclosures may well have on the free exercise by petitioner's members of their constitutionally protected right of association." 357 U. S., at 463. The same path to decision is evident in *Bates* v. *City of Little Rock*, 361 U. S. 516 (1960); *NAACP* v. *Button*, 371 U. S. 415 (1963); and *Railroad Trainmen* v. *Virginia Bar*, 377 U. S. 1 (1964). Only last week, in *United Mine Workers* v. *Illinois Bar Assn.*, *ante*, p. —, the Court weighed the right to associate in an organization furnishing salaried legal services to its members against the State's interest in insuring adequate and personal legal representation, and found the State's interest insufficient to justify its restrictions.

Nor does the Court mandate a different course in this case. Apparently "active" members of the Communist Party who have demonstrated their commitment to the illegal aims of the Party may be barred from defense facilities. This exclusion would have the same deterrent effect upon associational rights as the statute before us, but the governmental interest in security would override that effect. Also, the Court would seem to permit barring respondent, although not an "active" member of the Party, from employment in "sensitive" positions in the defense establishment. Here, too, the interest in anticipating and preventing espionage or sabotage would outweigh the deterrent impact of job disqualification. If I read the Court correctly, associating with the Communist Party may at times be deterred by barring members from employment and nonmembership may at times be

imposed as a condition of engaging in defense work. In the case before us the Court simply disagrees with the Congress and the Defense Department, ruling that Robel does not present a sufficient danger to the national security to require him to choose between membership in the Communist Party and his employment in a defense facility. Having less confidence than the majority in the prescience of this remote body when dealing with threats to the security of the country, I much prefer the judgment of Congress and the Executive Branch that the interest of respondent in remaining a member of the Communist Party, knowing that it has been adjudicated a Communist-action organization, is less substantial than the public interest in excluding him from employment in critical defense industries.

The national interest asserted by the Congress is real and substantial. After years of study, Congress prefaced the Subversive Activities Control Act of 1950, 64 Stat. 987, 50 U. S. C. §§ 781–798, with its findings that there exists an international Communist movement which by treachery, deceit, espionage, and sabotage seeks to overthrow existing governments; that the movement operates in this country through Communist-action oreganizations which are under foreign domination and control and which seek to overthrow the Government by any necessary means, including force and violence; that the Communist movement in the United States is made up of thousands of adherents, rigidly disciplined, operating in secrecy, and employing espionage and sabotage tactics in form and manner evasive of existing laws. Congress therefore, among other things, defined the characteristics of Communist-action organizations, provided for their adjudication by the SACB, and decided that the security of the United States required the exclusion of Communist-action organization members from employment in certain defense facilities. After long and com-

plex litigation, the SACB found the Communist Party to be a Communist-action organization within the meaning of the Act. That conclusion was affirmed both by the Court of Appeals, *Communist Party* v. *SACB*, 107 U. S. App. D. C. 279, 277 F. 2d 78 (1959), and this Court, 367 U. S. 1 (1961). Also affirmed were the underlying determinations, required by the Act, that the Party is directed or controlled by a foreign government or organization, that it operates primarily to advance the aims of the world Communist movement, and that it sufficiently satisfies the criteria of Communist-action organizations specified by § 792 (e), including the finding by the Board that many Party members are subject to or recognize the discipline of the controlling foreign government or organization. This Court accepted the congressional appraisal that the Party posed a threat "not only to existing government in the United States, but to the United States as a sovereign, independent nation . . . ." 367 U. S., at 95.

Against this background protective measures were clearly appropriate. One of them, contained in § 784 (a)(1)(D), which became activated with the affirmance of the Party's designation as a Communist-action organization, makes it unlawful "[f]or any member of such organization, with knowledge or notice . . . that such order has become final . . . to engage in any employment in any defense facility . . . ." A defense facility is any of the specified types of establishment "with respect to the operation of which [the Secretary of Defense] finds and determines that the security of the United States requires" that members of such organizations not be employed. Given the characteristics of the Party, its foreign domination, its primary goal of government overthrow, the discipline which it exercises over its members, and its propensity for espionage and sabotage, the exclusion of members of the Party who know the Party is a

Communist-action organization from certain defense plants is well within the powers of Congress.

Congress should be entitled to take suitable precautionary measures. Some Party members may be no threat at all, but many of them undoubtedly are, and it is exceedingly difficult to identify those in advance of the very events which Congress seeks to avoid. If Party members such as Robel may be barred from "sensitive positions," it is because they are potential threats to security. For the same reason they should be excludable from employment in defense plants which Congress and the Secretary of Defense consider of critical importance to the security of the country.

The statute does not prohibit membership in the Communist Party. Nor are respondent and other Communists excluded from all employment in the United States, or even from all defense plants. The touchstones for exclusion are the requirements of national security, and the facilities designated under this standard amount to only about one percent of all the industrial establishments in the United States.

It is this impact on associational rights, although specific and minimal, which the Court finds impermissible. But as the statute's dampening effect on associational rights is to be weighed against the asserted and obvious government interest in keeping members of Communist-action groups from defense facilities, it would seem important to identify what interest Robel has in joining and remaining a member of a group whose primary goals he may not share. We are unenlightened, however, by the opinion of the Court or by the record in this case, as to the purposes which Robel and others like him may have in associating with the Party. The legal aims and programs of the Party are not identified or appraised nor are Robel's activities as a member of

the Party. The Court is left with a vague and formless concept of associational rights and its own notions of what constitutes an unreasonable risk to defense facilities.

The Court says that mere membership in an association with knowledge that the association pursues unlawful aims cannot be the basis for criminal prosecution, *Scales* v. *United States*, 367 U. S. 203 (1961), or for denial of a passport, *Aptheker* v. *Secretary of State*, 378 U. S. 500 (1964). But denying the opportunity to be employed in some defense plants is a much smaller deterrent to the exercise of associational rights than denial of a passport or a criminal penalty attached solely to membership, and the Government's interest in keeping potential spies and saboteurs from defense plants is much greater than its interest in keeping disloyal Americans from traveling abroad or in committing all Party members to prison. The "delicate and difficult judgment" to which the Court refers should thus result in a different conclusion from that reached in the *Scales* and *Aptheker* cases.[2]

The Court's motives are worthy. It seeks the widest bounds for the exercise of individual liberty consistent with the security of the country. In so doing it arro-

[2] I cannot agree with my Brother BRENNAN that Congress delegated improperly when it authorized the Secretary of Defense to determine "with respect to the operation of which [defense facilities] . . . the security of the United States requires the application of the provisions of subsection (a) of this section." Rather I think this is precisely the sort of application of a legislative determination to specific facts within the administrator's expertise that today's complex governmental structure requires and that this Court has frequently upheld. *E. g., Yakus* v. *United States*, 321 U. S. 414 (1944). I would reject also appellee's contention that the statute is a bill of attainder. See *United States* v. *Brown*, 381 U. S. 437, 462 (1965) (WHITE, J., dissenting).

gates to itself an independent judgment of the requirements of national security. These are matters about which judges should be wary. James Madison wrote:

> "Security against foreign danger is one of the primitive objects of civil society. . . . .
>
> ". . . The means of security can only be regulated by the means and the danger of attack. They will in fact be ever determined by these rules, and by no others. It is in vain to oppose constitutional barriers to the impulse of self-preservation. It is worse than in vain; because it plants in the Constitution itself necessary usurpations of power, every precedent of which is a germ of unnecessary and multiplied repetitions." [3]

[3] The Federalist No. 41 (Cooke ed. 1961) 269–270.